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REPORTS

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TABLE OF CASES

First number denotes pages of The Madras Weekly Notes Full Series.

PRIVY COUNCIL

Ali Mahomed Adamali v. Emperor. 564 ; 112
Daniel Youth v. King 610 ; 121
Emperor v. Benoari Lal Sarma 41 (2) ; 1
Emperor v. Nazir Ahmad 49 ; 9
Emperor v. Sibnath Banerji 546 ; 94
Harold White v. King 560 (2) ; 108 (2)
Jairam Das v. Emperor 366 ; 62
Judah v. Isolyne Shrojbashini Bose 634 ; 129
Kishori Lal v. Emperor 188 ; 40
Mahbub Shah v. Emperor 373 ; 69
Malak Khah v. Emperor 778; 140
Nur Mohammed v Emperor 560 (1) ; 108 (2)
Shamdasani v. Emperor 371 ; 67
Strologo v. King 47 ; 7

FEDERAL COURT

Bannerjee v. Emperor 113 ; 29
Basanta Chandra Ghose v. Emperor 445 ; 91
Basdeo Agarwala v. Emperor 428 (2) ; 80 (2)
Meads v. Emperor 110 ; 26

FULL BENCH

District Judge of Anantapur v. Vema Reddi 101 ; 17
Pleader, Bellary In the matter of 106 (2) ; 22 (2)

CRIMINAL

Ammotty In re 247 ; 45
Appadurai Pillai In re 114 : 30
Arunachala Goundan v. Chinnadorai 109 ; 25
Beckett v. Wendy E. Norris 249 ; 47
Chellakani Sahib In re 56 ; 16
Chenchuramayya In re 732 ; 135
Chokkalingam In re 571 ; 119
Crown Prosecutor v. Krishnan 435 ; 87
Crown Prosecutor v. Ramanatha Aiyar 636 ; 130
Devaraja Tharakan v. Emperor 438 ; 90
Doraiswami Naidu In re 105 ; 21
Duraiswami Koundan In re 730 (1) ; 134
Eswaradoss Kalidoss In re 425 ; 77
Gangavva In re 722 (2) ; 132
Gnanasundari v. Nallathambi 421 ; 73
Kalianna Goundan v. Settia Goundan 697 : 128
Kumaraiah v. Chinna Naicker 783 (1) : 144
Lakshmayya v. Emperor 433 ; 85
Lebhai In re 557 ; 105
Mahabub Sahib v Sidheswaraswami temple. 569 ; 117
Manager, Indian Express, In re 430 ; 82
Marudai Pillai In re 431 ; 83
Mundy In re 262 ; 50
Munuswami Pillai v. Doraikannu Ammal 691 ; 127
Muthu Nadar. In re 181 ; 33
Mutyalu In re 689 ; 125
Natesa Mudaliar. In re 106 (1) ; 22 (1)
Obigadu In re 556 ; 104
Padmanabha Iyer In re 263 ; 51
Pattabi Chetti In re 559 ; 107
Public Prosecutor v. Narayana Reddy 184 ; 36
Public Prosecutor v. Subba Rao 54 ; 14
Public Prosecutor v Venkata Reddi 102 ; 18
Ramachandran In re 248 ; 46
Ramachandra Rao In re 771 (2) ; 138 (1)
Ramakrishnan In re 205 ; 43
Ramaraju In re 692 (1) ; 131
Rami Reddi In re 107 ; 23
Rangarao In re 185 (2) ; 38 (1)
Seshu Iyer In re 185 (1) ; 37
Sinna Ranga Boyan In re 428 (1) ; 80 (1)
Somaiah v. Emperor 186 ; 38 (2)
Subbai Goundan In re 182 ; 34
Subbayya v. Kesavalu 280 ; 56
Swaminathan v. Emperor 361 (2) ; 57
Thambi Iyengar In re 771 (1) ; 138(1)
Thirupelu In re 427 ; 79
Vasan In re 434 ; 86
Venkata Reddi v. Bugga Reddi 266 ; 54
Venkatasubbier In re 55 ; 15
Venugopal Mudaliar v. Neelakanta Mudaliar 104 ; 20
Viraragahava Ayyangar In re 770 ; 139

THE
MADRAS WEEKLY NOTES
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1945 REPORTS 1945

PRIVY COUNCIL

(Appeal from Federal Court)

November 6, 1944

THE LORD CHANCELLOR (VISCOUNT SIMON) LORD ROCHE LORD PORTER LORD GODDARD & SIR MADHAVAN NAIR

The King Emperor
v.
Benoari Lal Sarma and others*

Special Criminal Courts Ordinance (II of 1942), Ss. 5, 10, 16 & 26 — Validity— Criminal Procedure Code, (V of 1898)— Government of India Act (1935) Ss. 102, 223, 311 (6) 316 & Sch. IX, Para 72—Legislative delegation to executive—When valid.

Whether an emergency existed at the time when an Ordinance is made and promulgated is a matter of which the Governor General is the sole judge.

Where an Ordinance recited that an emergency has arisen which makes it necessary to provide for the setting up of special criminal courts and the body of the Ordinance contained the necessary framework for courts of criminal jurisdiction, and their procedure with restrictions on appeal, but the Ordinance did not itself set up any of these courts but provided that the Ordinance shall come into force in any Province only if the Provincial Government being satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the province and shall cease to be in force when such notification is rescinded.

Held, *that the Ordinanee is valid and is not open to the objections that the Ordinance does not disclose an emergency or that it amounted to delegated legislation by which the Governor General without legal authority sought to pass the decision as to whether an emergency existed to the Provincial Governments instead of deciding it for himself.*

The Governor General may well have considered that, in view of the existing emergency, it was necessary to have a scheme for Special Courts drawn up and all ready for application if the existing emergency was further aggravated. It is not necessary that the bringing of Special Courts into actual existence and operation all over India must take place at the same time.

It is no valid objection in point of legality to ihe Governor General's Ordinance taking the form that the actual setting up of Special Courts under the terms of the Ordinance should take place at the time and within the limits judged to be necessary by the Provincial Governments specially concerned. Conditional legislation of this kind is, in many cases, convenient and is not a delegated legislation at all.

The powers of a Governor General acting under paragraph 72 of the 9th Schedule are as wide as the powers of the Indian legislature which, in view of the proclamation under S. 102, has power to make laws for

* 1945 M.W.N. 41

a Province even in respect of matters which would otherwise be reserved to the Provincial legislature.

Where the condition as to emergency is fulfilled, the Governor General, acting under paragraph 72, may repeal or alter the ordinary law as to the revisionary jurisdiction of the High Court just as the Indian legislature might to.

Where the Ordinance makes ii possible to discriminate between one accused and another, or between one class of offences and another, so that cases may be tried either in the Special Courts or in the ordinary and established criminal Courts according to the direction or decision of the Provincial authorities,

Held, *that the question whether the Ordinance is* intra vires *or* ultra vires *does not depend on such considerations of jurisprudence or policy. There ie nothing in the Indian Constitution to render invalid a Statute whether passed by the Central Legislature or under the Governor General's emergency powers which does not accord with the principle of wise and well-framed legislation, that it is better if circumstances permit to frame a Statute in such a way that the offender may know in advance before what court he will be brought if he is charged with a given crime. It is a question of policy, not of law.*

In construing enacted words, courts are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language. There is no doubt that even in India, the legislature can validly enact that the choice of courts should vest with an executive authority as an exercise of discretion conferred on the authority to make laws for the peace, order and good government of India.

If the Ordinance has no validity, the special magistrate is in the same position as a private person who took upon himself to conduct a trial and sentence the accused without any authority at all. In the latter alternative, the remedy of release by process in the nature of habeas corpus *(S. 491 Cr. P. C.) would be the appropriate remedy.*

Appeal from the decision of the Federal Court dated 4—6—1943 and reported in (1943) M.W.N. 380: Cr. 76.

N. L. C. Macaskie, K. C. & Sir Walter Moncton, K. C., for Applts.

Sir Thomas Strangman, K. C. W. Wallach & R. K. Handoo, for Respts.

JUDGMENT

The Lord Chancellor: This is an appeal by the Government of India from a judgment of the Federal Court (Varadachari C.J. and Zafrulla Khan J. Rowland J. dissenting) dated 4th January, 1943, dismissing an appeal from a judgment of the High Court at Calcutta (Sir Harold Derbyshire C. J., Khundkar J., and Sen J.) setting aside a conviction of 15 individuals by a Special Magistrate purporting to act under Ordinance No. II of 1942 promulgated by the Governor-General on 2nd January, 1942. The ground upon which the conviction was set aside was that the Ordinance was *ultra vires*. The question is largely academic, for upon Ordinance No. II being declared by the Federal Court to be *ultra vires* Ordinance XIX of 1943 was promulgated to replace it. But in view of the elaborate argument that has taken place and the way in which the topic has been dealt with in the judgments in India, their Lordships think that the better course is to decide the question whether Ordinance II is invalid, especially as this may be of assistance in deciding other questions which may arise herafter as to the validity of Ordinances made, in case of emergency, by the Governer-General under the authority of S. 317 and para 72, of the 9th Schedule of the Government of India Act1935.

Their Lordships must, however, make a preliminary observation on the way in which the issue of the validity of the Ordinance has been dealt with by the Indian Courts. The appeal from the Special Magistrate who convicted the accused was brought to the High Court under its criminal revisionary jurisdiction by a petition for revision under section 435 and 439 of the Code of Criminal Procedure This assumes that the court below was a valid inferior Court whose decision calls, in the view of the appellants who were convicted and sentenced by it, for revision. But if the Special Magistrate who tried the case was a valid court, duly authorised by the Ordinance, then by the very terms of the Ordinance there is no appeal to the High Court. Mr. Justice Sen, at the beginning of his judgment in the High Court, points this out very clearly. If, on the other hand, the Ordinance had no validity the Special Magistrate was in the same position as a private person who took upon himself to conduct a trial of the appellants and to sentence them to imprisonment without any authority at all. In this latter alternative, the remedy of release by process in the nature of *habeas corpus* (section 491 of the Cr. P. C.)

would be the appropriate remedy. Their Lordships contend themselves with pointing this out, without seeking to dispose of the litigation on this ground, as in their opinion the matter can be satisfactorily dealt with by considering whether the objections taken to the Ordinance have any validity.

The Governor-General purported to make and promulgate the Ordinance under a power conferred on him by paragraph 72 of the 9th Schedule of the Government of India Act, 1935. That paragraph—which must, of course, be read in the light of the India and Burma (Emergency Provisions) Act, 1940 (whereunder the operation of the words "for the space of not more than six months from its promulgation" was suspended during the period therein specified) – provides as follows :—

"72. The Governor-General may, in case, of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more then six months from its promulgation, have the like force of law as an Act passed by the Indian legislature; but the power of making ordinances under this section is subject to the like restrictions as the power of the Indian legislature to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Indian legislature, and may be controlled or superseded by any such Act."

It is to be observed that the paragraph does not require the Governor-General to state that there is an emergency, or what the emergency is, either in the text of the Ordinance or at all, and assuming that he acts *bona fide* and in accordance with his statutory powers, it cannot rest with the Courts to challenge his view that the emergency exists. In the present instance, such questions are immaterial, for at the date of the Ordinance (2nd January, 1942) no one could suggest that the situation in India did not constitute an emergency of the most anxious kind. Japan had declared war on the previous December 7th; Rangoon had been bombed by the enemy on December 23rd and again on December 25th; earlier Ordinances had recited that an emergency had arisen which required special provision being made to maintain essential services, to increase certain penalties, to deal with looting of property left unprotected by evacuation of premises, and so forth. Their Lordships entirely agree with Mr. Justice Rowland's view that such circumstances might, if necessary, properly be considered in determining whether an emergency had arisen; but, as that learned judge goes on to point out, and, as had already been emphasised in the High Court, the question whether an emergency existed at the time when an Ordinance is made and promulgated is a matter of which the Governor-General is the sole judge. This proposition was laid down by the Board in *Bhagat Singh* v. *The King Emperor* (1) and is plainly right. On September 3rd, 1939, the date on which war was proclaimed between His Majesty and Germany, the Governor-General, acting under section 102 of the Government of India Act, 1935, had proclaimed that "a grave emergency exists whereby the security of India is threatended by war" and thereupon the Indian legislature acquired power to make laws for a province with respect to any of the matters enumerated in the "Provincial Legislative List", with the result that the Governor-General, acting under paragraph 72 of the 9th Schedule, had in case of emergency the same width of legislative power.

Two objections, however, were raised to the validity of the Ordinance in connection with the question of "emergency." The ordinance recited that "an emergency has arisen which makes it necessary to provide for the setting up of special criminal courts", and the body of the Ordinance contained the necessary framework for courts of criminal jurisdiction consisting of Special Judges, Special Magistrates, and Summary Courts, the provisions as to their respective limits of jurisdiction and procedure, together with restrictions on appeal (which fall to be separately considered in this judgment), but the Ordinance did not itself set up any of these courts but provided by section I, Sub-seetion (3) that the Ordinance.

"shall come into force in any Province only if the Provincial Government being satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the Province, and shall cease to be in force when such notification is rescinded."

In view of this last provision, it was contended that the Ordinance was invalid either because the language of the section showed that the Governor-General, notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or else because the section amounted to what was called "delegated legislation", by which the Governor-General without legal authority sought to pass the decision as to whether an emergency existed to the Provincial Government instead of deciding it for himself.

1. (1931) M.W.N. 601: Cr. 113: 58 I.A. 169 P.C.

There is, in their Lordships' opinion, no valid ground for either of these contentions. As regards the first one, it is enough to say that an emergency may well exist which "makes it necessary to provide for the setting up of special criminal courts" without requiring such courts to be actually set up forthwith all over India. Any other view would appear to deny to the Governor-General the possibility, when faced with an emergency, of making provisions which could be instantly applied if the danger increased and became even more critical to the part of India where it was necessary to apply them. It would in fact (as Beaumont C. J. observed in reference to a similar objection in the Bombay High Court, in *Shreekant Pandurang* v. *Emperor* [2]) deny to the Governor-General, when faced with an emergency, the exercise of any foresight in the protection of the State. He may well have considered that, in view of the existing emergency, it was necessary to have a scheme for Special Courts drawn up and all ready for application if the existing emergency was further aggravated. A very similar situation arose in this country when, under the Emergency Powers Act, the Government devised and prepared for instant application a system of Zone Courts which were to be put into force only if, owing to invasion by the enemy or the like, the ordinary courts in some part of the country were judged unable to function satisfactorily. Mr. Justice Sen in the High Court expressed the opinion that "the provisions of this Ordinance proclaim unmistakably that the Governor-General did not think that an emergency which necessitates the Ordinance actually existed. He may have thought that such an emergency may arise at some future time. That, however, is not enough. The Governor-General had no power to promulgate this Ordinance unless he was of opinion that the emergency requiring it actually existed; it is therefore *ultra vires* of the Governor-General." With all respect to the learned Judge, their Lordships are quite unable to accept this reasoning: it is perfectly possible, and indeed it is quite obvious, that the Governor-General regarded the situation on January 2nd, 1942, as constituting an emergency—in view of what was happening it would be remarkable if he did not—and this justified and authorised the Ordinance providing in advance for Special Courts. It does not in the least follow that the bringing of Special Courts into actual existence and operation all over India must take place at the same time.

The second objection had attracted more support, but is, in their Lordships' opinion, equally unfounded. It is undoubtedly true that the Governor-General, acting under paragraph 72 of the 9th Schedule, must himself discharge the duty of legislation there cast upon him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all. His powers in this respect, in cases of emergency, are as wide as the powers of the Indian legislature which, as already pointed out, in view of the proclamation under section 102, had power to make laws for a Province even in respect of matters which would otherwise be reserved to the Provincial legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's Ordinance taking the form that the actual setting up of a Special Court under the terms of the Ordinance should take place at the time and within the limit judged to be necessary by the Provincial Government specially concerned. This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by whch the local application of the provision of a Statute is determined by the judgment of a local administrative body as to its necessity. Their Lordship are in entire agreement with the views of the Chief Justice of Bengal and of Mr. Justice Khundkar on this part of the case. The latter judge appositely quotes a passage from the judgment of the Privy Council in the well-known decision in *Russell* v. *The Queen* (3). In that case the Canadian Temperance Act, 1878 was challenged on the ground that it was *ultra vires* of the powers of the Parliament Act of Canada. The Temperance Act was to be brought into force in any country or city, if upon a vote of a majority of the electors of that country or city favouring such course, the Governor-General by Order in Council declared the relative part of the Act to be in force. It was held by the Privy Council that this provision did not amount to a delegation of legislative power to a majority of the voters in a city or country. Their Lordships said—

"The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons powers to legislate. Parliament itself enacts the conditions and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in

2. (1943) I.L.R. Bom. 331 (351)

3. (1882) 7 A.C. 229

many cases convenient, and is certainly not unusual and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency . . . If authority on the point were necessary it will be found in the case of *Queen* v. *Burah* [4] lately before this Board."

The next objection to be considered is the contention that section 26 of the Ordinance, which is framed to exclude the revisional and appellate powers of the High Court in cases dealt with by the Special Courts constituted under the Ordinance, was ineffective and *ultra vires* as being in conflict with section 223 of the Government of India Act, 1935. Section 223 provides:—

"Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act, and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred upon that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court . . . . shall be the same as immediately before the commencement of Part III of this Act".

Previous to 1935 the High Court had revisional jurisdiction over the magistrates' courts in the relevant area. The argument advanced was that this jurisdiction could not be taken away by an Ordinance made by the Governor-General under Paragraph 72, as the Governor-General's Ordinance was not an "Act of the appropriate Legislature". "Legislature", it was said, only means the Central Legislature consisting of the two Houses and the Governor-General, or the Provincial Legislature consisting of the two Houses and the Governor and the Governor-General when making an Ordinance in cases of emergency under Paragraph 72 was not either of these Legislatures. The argument, as Sir Harold Derbyshire pointed out in his judgment, overlooked the provision in section 311 (6) of the Act, which says:—

"Any reference in this Act to . . . . Acts of laws of the Federal or a Provincial Legislature shall be construed as including a reference to an Ordinance made by the Governor-General, etc."

There is, thus, no substance in this objection. Assuming that the condition as to emergency is fulfilled the Governor General acting under paragraph 72 may repeal or alter the ordinary law as to the revisionary jurisdiction of the High Court, just as the Indian Legislature itself might do.

There remains to be considered another objection to the validity of the Ordinance which is, as their Lordships understand, the main ground upon which it has been held to be *ultra vires*. The objection may perhaps be stated in more ways than one, but the substance of it as appears both from the judgment of Sir Harold Derbyshire in the High Court and of the Chief Justice in the Federal Court, is that the Ordinance makes it possible to discriminate between one accused and another, or between one class of offences and another, so that cases may be tried either in the Special Courts or under the ordinary and well established criminal procedure according to the direction and decision of Provincial authorities. It is evident that this is an aspect of the matter which has greatly troubled the majority of the judges in India who have had this case before them, and in view of the well-established practice in India by which decisions in criminal cases are open to review by a higher court, it is natural that those who are versed in applying this system should feel disturbed by the totally different arrangement contained in the Ordinance.

The following are the sections of the Ordinance which appear to have given the Judges in India most concern:—

"5. A special Judge shall try such offences or classes of offences, or such cases or classes of cases as the Provincial Government, or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing direct . . .

"10. A Special Magistrate shall try such offences or classes of offences or such cases or classes of cases other than offences or cases involving offences punishable under the Indian Penal Code with death, as the Provincial Government or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writting, direct . . ."

"14. If any question arises whether, under any order made under section 5 or section 10, an offence is triable by a Special Judge or a Special Magistrate, the question shall be referred for decision to the authority which made the order and the decision of that authority shall be final."

"16—(1) A Summary Court shall have power to try such offences or classes of offences, or such cases or classes of cases as the District Magistrate, or in a Presideney-town the Chief Presidency Magistrate, or a servant of the Crown authorised in this behalf by the District Magistrate or Chief Presidency Magistrate, may by general or special order direct:

Provided that no person shall be tried by a Summary Court for an offence which is punishable with imprisonment for a term exceeding two years, unless it is an offence specified in sub-section (1) of section 260 of the Code.

(2) The District Magistrate or Chief Presidency Magistrate may by general or special order give direction as to the distribution among the summary Courts within his jurisdiction of cases triable by them under sub-section (1)."

Sir Harold Derbyshire found that the sections above quoted were invalid. He pointed

4. (1878) 3 A.C. 889

out, with justice, that the Ordinance left it to the local Government, or to some officer of the local Government empowered by it in that behalf, to direct what offences or classes of classes, should be tried by the Special Courts. He thought that this amounted to repealing the Code of Criminal Procedure in part, for under the Ordinance there would be no trial by jury and no right of appeal and no right of revision by superior courts, including the High Courts, such as are enacted by the Code. "In effect", he said, "it is the Provincial Government or the District Magistrate acting not in a judicial capacity but in an administrative capacity that deprives the subject of his right under the Code and repeals its valid provisions as far as he is concerned. That, in my view, is repealing the Code of Criminal Procedure in part—in that instance legislation *ad hoc* for the man's case". He added that he did not find authority in section 72 to justify this result: and in his view the above quoted sections, which he declared invalid, purported to authorise persons other than the duly authorised legislature constituted under the Government of India Act, 1935, to repeal *ad hoc* certain provisions of the Criminal Procedure Code and of the Letters Patent of the High Court.

Mr. Justice Khundkar agreed with the Chief Justice on this point and stated his objection to the above-quoted sections of the Ordinance thus:—

"The result is that no man accused of an offence may know whether he is to be tried by a court under the Code, subject to all the safeguards provided by the Code, including a right of appeal or revision under the Code, or to be tried on the mere motion of the Provincial Government or of an officer of the Crown empowered by the Provincial Government by some one or other of the special Courts under the Ordinance. The Provincial Government or an officer of the Crown empowered by the Provincial Government is endowed with a power that is far-reaching, unfettered by rule, unconditional and subject to no supervision by the High Court or by any court under the Code. It is a power to direct any person accused of any criminal offence to be tried by one or other of the courts constituted under the Ordinance."

The learned Judge goes on to point out what he regards as "the possible mischief which may flow from the unwise or injudicious exercise of such a power", fortifying his criticism by quotations from well known writers on jurisprudence such as Anson and Salmond; and he concludes that the above-quoted sections are *ultra vires* on the ground that the Ordinance gives to the Provincial Governments a "power to effectuate jurisdiction of Special Criminal Courts by making orders in individual cases or groups of cases".

Mr. Justice Sen, as their Lordships understand, did not differ from the Chief Justice and Mr. Justice Khundkar in this view, though he rested his decision that the Ordinance was *ultra vires* on other grounds which their Lordships have already indicated.

In the Federal Court the Chief Justice dwelt on the value of the revisionary jurisdiction, but considered that the most serious defect in the impugned Ordinance was the power it conferred to discriminate between one accused and another by directing trial in different courts. He developed his objections on this point by elaborate references to the constitutional principles involved in certain decisions of the Supreme Court of the United States and of the High Court of Australia, and quoted passages from the writings of Sir Courtenay Ilbert and of Sir Cecil Carr to illustrate the relation between executive and legislative powers in the British Constitution. He concluded that sections 5, 10 and 16 of the Ordinance are "open to objection as having left the exercise of the power thereby conferred on executive officers to their absolute and unrestricted discretion without any legislative provision or direction laying down the policy or conditions with reference to which that power is to be exercised". This was the ground upon which the Chief Justice and Mr. Justice Zafrulla Khan based their decision that the appeal of the Crown should be dismissed.

With the greatest respect to these eminent Judges, their Lordships feel bound to point out that the question whether the Ordinance is *intra vires* or *ultra vires* does not depend on considerations of jurisprudence or of policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the Ordinance by which he is purporting to exercise that authority. It may be that as a matter of wise and well framed legislation it is better if circumstances permit to frame a statute in such a way that the offender may know in advance before what court he will be brought if he is charged with a given crime; but that is a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian Constitution to render invalid a statute, whether passed by the Central Legislature or under the Governor-General's

emergency powers, which does not accord with this principle. Mr. Justice Rowland, at the beginning of his dissenting judgment, collects a number of striking quotations from previous judgments delivered in the Privy Council as to the proper rule of construction. Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used. The learned Judges who were in the majority in the Federal Court would presumably not contest this proposition, and their Lordships rather understand their view to be based on the conception that there is something underlying the written Constitution of India which debars the Executive Authority, though specially authorised by the statute or Ordinance to do so from giving directions after the accused has been arrested and charged with crime as to the choice of court which is to try him. Their Lordships are unable to find that any such constitutional limitation is imposed. Indeed, Mr. Justice Rowland points out that if it were held that where two sets of courts exist side by side power cannot be delegated to pass an order directing that a case shall come before the Special Court and not before the court under the Code, this would throw doubt on a long course of legislation in India where this very thing is enacted. The learned Judge cites 13 instances, and, in addition to these refers to the discretion conferred by the Indian Army Act and by the Indian Air Force Act upon the prescribed authority to decide in a particular case, where a criminal court and a court martial would both have jurisdiction, before which court the accused shall be brought for trial. There is not, of course, the slightest doubt that the Parliament of Westminister could validly enact that the choice of courts should rest with an Executive Authority, and their Lordships are unable to discover any valid reason why the same discretion should not be conferred in India by the law-making authority, whether that authority is the Legislature or the Governor-General, as an exercise of the discretion conferred on the authority to make laws for the peace, order, and good government of India.

Their Lordships will humbly advise His Majesty that the appeal should be allowed. The judgement of the Federal Court must be set aside and the Ordinance II of 1942 declared not to be *ultra vires.*

— *Appeal allowed.*

Privy Council

[Appeal from Malta]

July 19, 1944

THE LORD CHANCELLOR (VISCOUNT SIMON) LORD WRIGHT, LORD PORTER, LORD SIMONDS & LORD GODDARD

Eric Reginald Charles Alexander Strologo

v.

The King *

Criminal law—Principle on which the Privy Council will interfere in criminal cases—Breach of natural justice.

If a conviction has resulted from regarding as criminal, an act which is authorised by law, that does amount to a breach of natural justice as laid down in In re Dillet's *case, as it means there has been a conviction for what the law does not recognise as an offence.*

The appellant was indicted with having without a lawful order from the competent authorities, arrested, detained or confined a person against the will of the same and of having provided a place for carrying out such arrest, detention or confinement with the aggravating circumstance that the individual arrested, detained or confined received bodily harm and with the further aggravating circumstances that the detention or confinement was continued by him with the knowledge that an order had been issued by the competent authority for the release or production of the person detained. The lower court found the appellant fully guilty and sentenced the accused. The court appears to have addressed their minds solely to the question whether in arresting the boy, the appellant acted without authority, that is, as a private person who was not authorised by law to apprehend the offender and did not note that the appellant, a captain of the Royal Artillery had authority under the Defence Regulations to effect an arrest.

Held. *that the conviction must be set aside, as there was no illegal assumption of power which did not belong to him. The court acted on a misapprehension of the law and failed to take into account the powers conferred on the appellant by the Defence Regulations.*

Frank Gaham for Applt.

Attorney General & Kenelen Preedy for Respt.

JUDGMENT

LORD GODDARD; On 31st July, 1943, the appellant was indicated before His Majesty's

* 1945 M.W.N. 47

Criminal Court for the Island of Malta and its Dependencies with having without a lawful order from the competent authorities arrested, detained or confined a person against the will of the same and of having provided a place for carrying out such arrest, detention or confinement, with the aggravating circumstances that the individual arrested, detained or confined received bodily harm and with the further aggravating circumstances that the detention or confinement was continued by him with the knowledge that an order had been issued by the competent authority for the release or production of the person detained, contrary to Articles 85 and 86 (3) & (4) of the Criminal Laws. The Court convicted the appellant of the substantive offence and also found both of the alleged aggravating circumstances proved. They sentenced him to 13 months imprisonment with hard labour which was the minimum sentence prescribed by law, but the Governor in the exercise of his prerogative reduced the sentence to 3 months. That sentence, less a remission for good conduct, has been served. The appellant by special leave granted on 25th February, 1944, appealed against the conviction. At the conclusion of the argument their Lordships indicated that they would humbly advise His Majesty that the appeal should be allowed and the conviction quashed and now give their reasons for tendering such advice.

The facts were really not in dispute. The appellant is a Captain in the Royal Artillery and was acting as *liaison* officer with the R.A.F. at Tal Qali aerodrome. On 14th July last year, which was the third day of the invasion of Sicily, he parked a truck, a vehicle used in His Majesty's service, near a house which he had occusion to visit. On returning to the truck some time afterwards he saw the lad, whose arrest formed the subject of the charge, on the truck. According to the appellant the lad was in the truck and he saw him throught the windscreen. The lad's evidence was that he was not in the truck, but was standing on the running board with his hands behind his back looking at the speedometer and that he had been so standing for about 5 minutes. Whether the Court believed the appellant's evidence on this point or preferred the somewhat surprising account given by the lad is immaterial, for it is common ground that he was at least on some part of the truck. On seeing the appellant approach the lad ran away and the appellant chased and caught him. Unfortunately the appellant lost his temper, and hit the lad in the face and kicked him. He arrested him and took him back to the truck and put him into it. He then discovered some cigarettes were missing and that about 20 gallons of petrol had been taken out of the tank which was empty. The lad denied all knowledge of either the cigarettes or the petrol, but the appellant told him that he was taking him to Valletta police station. On the way towards Valletta they met a policeman and the appellant inquired of him where there was a police station, but then according to his evidence, realising that it was time he went on duty he drove to the aerodrome and handed over the lad to the Corporal on duty at the guard room and ordered him to detain him till the Military Police came for him. Again at the guard room he assaulted the boy. The subsequent history is really immaterial for the determination of this appeal, but it appears that the arrest caused considerable excitement in the neighbourhood which led to an Inspector of Police visiting the appellant and demanding that the boy should be released. A somewhat undignified altercation took place into which it is unnecessary to inquire in detail; it is enough to say that later in the evening the boy who had meanwhile been removed by order of the Provost Marshal to Hamrun police station was on somebody's order released. As a result of the treatment he received from the appellant the boy sustained slight injury, amounting according to the doctor's evidence to a scratch near the cornor of his eye and small scar or bruise on the leg. Had the appellant been charged with assault he would have had no defence; he would no doubt have been properly convicted and awarded a suitable punishment for that offence. It is they hope hardly necessary for their Lordships to emphasise that a person in uniform, be he officer, N.C.O. or private, is no more than anyone else entitled to assault another subject of the king whether in peace or time of war. But that was not the offence for which the appellant was convicted. He was charged and convicted under Article 85 of the Criminal Laws which makes it an offence to arrest detain or confine any person without a lawful order from the competent authorities, saving the case where the law authorises private individuals to apprehend offenders. Now at this time the Malta Defence Regulations 1939 were in force throughout the Island. Those Regulations derive their statutory effect from Sec. 4 sub-Sec. (1) of the Emergency Powers (Defence) Act 1939 and the Emergency Powers (Colonial Defence) Order in Council 1939 made thereunder. Under Regulation 26

it is an offence to impair the efficiency or impede the working of any vehicle used or intended to be used for the purpose of any of H. M. forces. Regulation 35 provides that no person shall unlawfully enter or board any vehicle, vessel or aircraft used or appropriated for any of the purposes of H. M. service and if any person is found in any vehicle, vessel or aircraft on any occasion on which he has entered or boarded it in contravention of this paragraph then without prejudice to any proceedings which may be taken against him he may be removed by an authorised officer which by Regulation 4 means a commissioned officer in any of H. M. forces, from the vehicle, vessel or aircraft. Then by Regulation 72, among other persons, any member of H. M. forces acting in the course of his duty as such may arrest without warrant any person whom he has reasonable ground for suspecting to have committed a war offence. A war offence is an offence against any of the Regulations. Now it is clear that the appellant had reasonable grounds for suspecting that the boy had committed a war offence; he was seen on the truck and therefore was committing a breach of Regulation 35. The prohibition contained in the Regulation is absolute; no question of intent or state of mind in involved. It follows that the appellant as a member of H. M. forces acting in the course of his duty as such was entitled under Regulation 72 to arrest him without warrant. The Attorney General submitted that the Court was justified in thinking that he arrested the boy because he suspected him of stealing cigarettes which were his and not government property and that accordingly there could be no justification for his action. But the facts show that he chased and arrested the boy before he knew that his cigarettes were missing, and also before he knew that petrol had been taken from the tank, so that it is unnecessary to consider whether he had reasonable grounds for suspecting that the boy had been a party at least to the theft of petrol which would have been another war offence under Regulation 26. As the Court apparently delivered no reasoned judgment their Lordships are without information as to the grounds upon which they came to the conclusion that the appellant had been guilty of an offence under Article 85, but from the course of the trial it appears as though they must have addressed their minds solely to the question whether in arresting the boy he acted without authority, that is as a private person who was not authorised by law to apprehend an offender. The whole case for the appellant was that Article 85 had no application because whether or not the appellant was to be regarded as a private person he had authority under the Defence Regulations to effect an arrest. Consequently there was no illegal assumption of a power which did not belong to him. The facts do not appear to admit of any other conclusion and their Lordships therefore cannot but think that the Court acted on a misapprehension of the law and failed to take into account the powers conferred on the appellant by the Defence Regulations. The principles upon which this Board acts in advising His Majesty to review proceedings in Courts of criminal jurisdiction were laid down in *in re Dillet* (1) and have recently been restated so that there is no necessity to repeat them here. It is enough to say that if a conviction has resulted from regarding as criminal an act which is authorised by law that does amount to a breach of natural justice, because it means that there has been a conviction for what the law does not recognise as an offence. These are the reasons which moved their Lordships to tender the humble advice to His Majesty which they announced at the close of the argument.

N.T.R.

Privy Council

[Appeal from Lahore]

October 17, 1944

THE LORD CHANCELLOR (VISCOUNT SIMON) LORD PORTER, LORD SIMONDS, LORD GODDARD & SIR MADHAVAN NAIR

The King Emperor

v.

Khwaja Nazir Ahmad*

Criminal law—Statutory duties imposed on police and judiciary—Power of judiciary to interfere with police investigation—Cr.P.C., Ss. 561-A, 154 & 156.

In India, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognisable crime without requiring an authority from the judicial authorities. It would be an unfortunate result, if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always

1. (1887) 12 A.C. 459

*1945 M.W.N. 49

of course subject to the right of the court to intervene in an appropriate case when moved under S. 491 Cr.P.C., to give directions in the nature of habeas corpus.

The court s function begins when a charge is preferred before it and not until then. The court can legitimately intervene only on prosecution and not in the stage of investigation.

If no cognisable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation.

S. 561-A only provides that those powers which the court already inherently possessed shall be preserved. It is inserted, lest it should be considered that the only powers possessed by the court are those expressly conferred by the Criminal Procedure Code, and that no inherent power had survived the passing of the Act.

G. D. Roberts, K. C., W. Wallach & B. Mc Kenna, for Applt.

G. S. Rawcastle K. C. & S. A. Kyffin, for Respts.

JUDGMENT

Lord Porter: This appeal is brought from a judgment and order of the High Court of Judicature at Lahore dated the 24th October 1941 (Criminal Revision Side). The question raised is stated, and their Lordships think correctly stated, in the case presented by the respondent to be whether the High Court had power, under section 561-A of the Code of Criminal Procedure, to quash all proceedings taken in pursuance of two first information reports.

The complainant in each case was one S. M. Saleh: the earlier report was made on the 31st August, 1941, and the latter on the 5th September of the same year.

The offence in the first is stated to be in breach of section 420 of the I.P.C. The facts are set out in a loose and slovenly manner and condesend on little exact detail. The result is that it is at least doubtful wether the offence should not have been described as committed in breach of section 417 instead of section 420: the vital difference between the two being that whereas an offence against the former is non-cognisable and investigation of it can only be undertaken by the police on the instructions of a magistrate, whereas in the other case the police can act on their own motion under section 154 and 156 of the Cr.P.C.

However this may be and however the offence may be described in the report itself, their Lordships are satisfied that there can rightly be spelt out of it an offence against section 409 which is also a cognisable offence and possibly also one against section 420.

Apart from this, the later report though again it condescends upon rather meagre particulars, plainly indicates an accusation of an offence against section 409 and the offence is so described.

In their Lordships' view therefore, both information reports charge the accused man with cognisable offences under which the police are entitled to enquire without a magistrate's order

Their Lordships think it right to set out these matters because it was strenuously argued before them on behalf of the respondent that the only accusation of which account could be taken was that contained in the first of the two reports, that the offence there charged was a non-cognisable offence and therefore the police were precluded under seetion 155 of the Cr.P.C. from enquiring into it without a magistrate's order.

The argument, as their Lordships understood it, was that the only information report under sections 154 to 156 of the Cr P.C. was that recorded on the 31st August, 1941, that the allegations recorded at a later stage of the 5th September were not an information report, but a statement taken in the course of an investigation under sections 161 and 162 of the Code, that there was therefore no reported cognisable offence into which the police were entitled to enquire, but only a non cognisable offence which required a magistrate's order if an investigation was to be authorised.

Their Lordships cannot accede to this argument. They would point out that the respondent in his case treats each document as a separate information report and indeed, on the argument presented on his behalf, rightly so, since each discloses a separate offence, the second not being a mere amplification of the first, but the disclosure of further criminal activities. But in any case the receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation. No doubt in the great majority of cases criminal prosecutions are undertaken as a result of information received and recorded in this way, but their Lordships see no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely

leads them to the belief that a cognisable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged. Section 157 of the Cr. P. C, when directing that a police officer, who has reason to suspect *from information or otherwise* that an offence which he is empowered to investigate under section 156 has been committed shall proceed to investigate the facts and circumstances, supports this view.

In truth the provisions as to an information report (commonly called a first information report) are enacted for other reasons. Its object is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished, and it has to be remembered that the report can be put in evidence when the informant is examined if it is desired to do so.

As has already been pointed out, the respondent himself speaks of two information reports in the case presented for their Lordships' consideration. Though the High Court in their judgment discussed the question whether the only crime formally disclosed was not cognisable and if so whether the investigation based upon the information report of the 30th August should not be quashed, they gave no decision on the matter, saying only that it raised a difficult point of law which they found it unnecessary to decide. They then proceeded to determine the point at issue upon other grounds which are those raised in the cases presented to their Lordships. These it is now necessary to discuss.

It appears that S. M. Saleh was the son of Sheik Rahmatulla who died in 1924 and that some time after his death diputes arose between his children including S. M Saleh as to the partition of his property. In this dispute arbitrators were originally appointed but their authority to act was afterwards withdrawn. One of the assets was a business which had been carried on by the father and after his death was continued by the wife and children as a single partnership concern according to the respective shares in the property left by the deceased man, and in 1937 a suit was begun by Saleh against his brothers and sister for partition of the family property and for dissolution of the partnership and rendition of accounts. The respondent is the Special Official Receiver of the High Court Lahore, and was in that capacity appointed on the 17th August 1937, as receiver in this suit.

The criminal charge which the police were investigating concerns his activities in the receivership and his alleged behaviour in seeking the appointment. According to Saleh he was persuaded by the respondent by means of various fraudulent representations to undertake the suit and to ask that the respondent should be appointed receiver of the property. If this story is true there is no doubt but that Saleh was a party to an appointment made for the purpose of overreaching his brothers and sister. At a later stage, however, Saleh became dissatisfied with the activities of the respondent as receiver and on the 27th June, 1939, applied to have him removed from the receivership and supported his application by an affidavit sworn on the 9th of June. The grounds of the application were substantially the same as those put forward in the two information reports as criminal acts calling for a prosecution.

The subordinate Judge refused to accede to the application, but the receiver voluntarily resigned and Saleh and one of his brothers S.A. Mannan were appointed to his place. In order to clarify the position however, the Subordinate Judge, a short time afterwards viz, on the 30th August, 1939, directed the respondent to continue in possession of certain property, the subject matter of the suit, notwithstanding that he had ceased to be receiver. From these two orders Saleh appealed to the High Court which on the 4th April, 1940, dismissed the appeal with costs, observing:

"It appears that the charges are baseless and that no loss attributable to the conduct of Khwaja Nazir Ahmad can be shown. The charges, it is clear from the record, have been made recklessly and without any attempt to examine the history of the case, a proper consideration of which would have prevented any reasonable person from using such terms as fraud and dishonesty. It is most improper that such charges should be made without any justification."

The next step appears to have been taken by one K. L Gauba, a barrister who had represented Saleh in certain of the proceedings. This gentleman on the 7th August, 1914, made a written complaint to a District Magistrate charging the respondent with a number of crimes and amongst others referred to the charge made by Saleh and enclosed his client's affidavit of the 9th June, 1939, in support of his application for the dismissal of the respondent from his receivership.

The District Magistrate made an order for investigation into the charges and under this order the respondent's records were seized by the police on the 27th August. Thereupon

the respondent petitioned the High Court on the 28th August, 1941, for their release and for stay of the investigation on the ground that he was a public servant within the definition of the Indian Penal Code, and therefore under seceion 197 of the Cr.P.C. exempt from interference by any Court without the previous sanction of the Government.

A day later the Crown presented a petition to the Court of Sessions Judge, Lahore, for revision of the magistrate's order, asking that the record might be forwarded to the High Court under section 438 of the Code with a recommendation that the proceedings might be quashed as being void *ab imitio* having been held without jurisdiction, and that pending the final decision of the petition by the High Court further proceedings might be stayed and the Senior Superintendent of Police, Lahore, ordered not to take any further action by way of investigation.

It appears that some application was also made by the respondent to the then Chief Justice who on the 28th August sent a telegram to the District Magistrate ordering him to stop all proceedings until further orders from the Chief Justice and to return all records immediately which had been taken by the police.

The District Magistrate acted in accordance with the instructions contained in the telegram and issued the necessary orders to the police who complied with them. Thereupon Mr. Gauba filed a revision petition against the order of the District Magistrate staying further proceedings.

Both matters came before the learned Sessions Judge who felt that he was bound by the order of the then Chief Justice and on the 3rd September stayed further proceedings, and forwarded the revisions to the High Court to be disposed of at the same time as the connected revision already pending there.

Meanwhile Saleh had lodged the two information reports already referred to and as a result the police again demanded the papers which they had originally seized under Mr. Gauba's complaint and began an investigation into the crimes alleged.

The immediate consequence was a further petition by the respondent submitting that the registration of the information report of the 31st August and the proceedings taken on it were illegal and unwa ranted by law and requesting the High Court to order the magistrate to direct that the books should be returned by the police and that the investigation might be stayed and depend upon the result of the petition filed by Mr. Gauba.

An interim stay was granted during the vacation and the hearing before the High Court took place on the 24th October, 1941.

Two matters were then considered, firstly the Court's right to take cognizance of Mr. Gauba's petition which was opposed by both the respondent and the Crown and in respect of which there were cross petitions asking that the proceeding be quashed, and secondly what, if any, order should be issued by way of interfering with the investigation begun by the police on Saleh's information reports.

As to the first, the High Court held that the matters complained of by Mr. Gauba concerned the action of the respondent in his official capacity as receiver and therefore that he being a public servant not removable from his office without the sanction of local government, and having been accused of an offence as such public servant, section 197 of Cr.P.C. precluded any Court from taking cognizance of the offence without the previous sanction of the Government having power to order his removal. They accordingly dismissed the complaint and quashed the order of the District Magistrate,

In that case Mr Gauba had petitioned the Court The prohibition contained in S. 197 is against action by any Court and in these circumstances the decision of the High Court was accepted and its order is not the subject of any appeal. The action of the police in investigating Saleh's charges is a different matter. The position in and time at which a court is required to take cognizance of the matter has not yet been reached and the only question arising upon this part of the case or discussed before their Lordships is whether the Court which in its inherent jurisdiction under section 561-A of the Cr.P.C. has power to make such orders as may be necessary to prevent abuse of the process of the Court or otherwise secure the ends of justice, is in the present case justified, in using their powers to quash the police investigation.

The High Court decided that it was entitled to quash the proceedings and prohibit the investigation. Their grounds appear to have been that similar charges were levelled against the respondent four years earlier. Some of these charges they said were then actively disproved and the rest held to be unfounded in an enquiry held as a consequence of the appli-

cation to remove the respondent from his post of receiver of the property. In those and in these proceedings as the High Court points out Saleh accused himself of having been a party to a corrupt conspiracy to defeat the ends of justice. The Judges appear to have made a careful examination of the previous record, to have come to the conclusion that Saleh's evidence was unacceptable, and to have searched the records of the police investigation until it was stopped, in order to see if any information beyond that contained in the earlier proceedings was forthcoming. In the result they found none.

All this may be good ground for a rejection of Saleh's accusation and a dismissal of any prosecution launched upon his information if such a prosecution ultimately takes place and if the Court are then satisfied that no crime has been established. But that stage has not been reached. It is conceded that the findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegation. Moreover the police investigation was stopped and it cannot be said with certainty that no more information could be obtained. But even if it were not it is the duty of a criminal court when a prosecution for a crime takes place before it to form its own view and not to reach its conclusion by reference to any previous decision which is not binding upon it.

In their Lordships opinion however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry.

In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an appropriate case when moved under section 491 of the Cr. P.C. to give directions in the nature of habeas corpus In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then. It has sometimes been thought that section 561-A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so The section gives no new powers, it only provides that those which the court already inherently possess shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Cr P.C. and that no inherent power had survived the passing of that Act.

No doubt if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed the police would have no authority to undertake an investigation and for this reason Newsam J., may well have decided rightly in *M. M. S. T. Chidambaram* v. *Shanmugam Pillai* (1). But that is not this case

In the present case the police have under sections 154 and 156 of the Cr. P C. a statutory right to investigate a cognizable offence without requiring the sanction of the Court, and to that extent the case resembles *Chhatrapat Singh Dugar* v. *Kharg Sing Lackmoran* (2) in which as the High Court has pointed out their Lordship's Board expressed the view that to dismiss an application on the ground that it would be an abuse of the powers of the Court might be to act on treacherous grounds.

Of course, in the present case as in the petition brought by Mr. Gauba no prosecution is possible unless the necessary sanction under section 197 of the Cr P.C. has first been obtained. But that stage like the stage at which the Court may legitimately intervene has not in their Lordships' opinion yet been reached. The question so far is one of investigation, not prosecution.

In accordance with their view, their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree and order of the High Court quashed and the investigation permitted to proceed.

Appeal allowed.

1. (1937) M.W.N 999; Cr. 215
2. (1911) I.L.R. 44 Cal. 535

Cr. App. No. 395 of 1944

November 15, 1944

SIR LIONEL LEACH C.J. & CLARK, J.

The Public Prosecutor

v.

Karumuri Subba Rao*

Defence of India Rules (1939), *Rule* 81 (2), *clauses* (*a*) *and* (*b*)—*Notification under clause* (*b*) *prohibiting withholding from sale — Validity — Withholding from sale — What is.*

The Collector notified an order purporting to act in exercise of the powers conferred by clause (*b*) *of rule* 81 (2) *of the Defence of India Rules prohibiting sellers from withholding matches from sale. Clause* (*b*) *did not relate to withholding of sale, but clause* (*a*) *of rule* 81 (2) *did. The respondent refused to sell any matches to a person notwithstanding that there were large stocks in the shop and was charged for breach of the Collector's order.*

Held, *that the Collector's order was defective and therefore not valid and that the respondent could not be convicted under the order.*

To constitute withholding from sale, the withholding need not extend over a period. The word 'withholding' must be construed in relation to the facts of each particular case.

44 *Bom. L.R.* 921, distinguished.

Appeal under Section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) by the Sessions Judge of the West Godavari Division at Ellore in Criminal Appeal No. 217 of 1943 (C.C. No. 167 of 1943 Joint Magistrate's Court, Narsapur).

Public Prosecutor (*V. L. Ethiraj*) for Crown.

V. Parthasarathy for the accused.

JUDGMENT

(SIR LIONEL LEACH, C.J.)

The respondent was charged in the Court of the Joint Magistrate of Narsapur with an offence punishable under rule 81 (4) of the Defence of India Rules. His father has a shop at Narsapur in which he sells matches retail. On the 22nd April 1943 a peon of the Tahsildar at Narsapur went to this shop to buy some matches. The respondent was in charge of the shop and told the would be customer that he had no matches in stock. This was untrue. In fact, there were large stocks of matches on the premises and additional large stocks in a godown belonging to the proprietor. On the 9th January 1943 the Collector of West Godavari notified an order, clause 1 of which stated that no person selling matches should withhold them from sale to any person on demand and on offer of the price fixed by the Government of India in that behalf so long as he possessed saleable stock. This notification purported to be made in the exercise of the powers conferred by clause (b) of sub rule 2 of rule 81 of the Defence of India Rules read with Government Order No. 243, Public (War) dated the 21st January 1942. As the respondent had refused to sell any matches to the peon notwithstanding that there were large stocks available in the shop, he was charged under the Collector's order. The Magistrate held that the charge had been substantiated. He fined the respondent Rs. 100 and directed that in default of payment he should undergo rigorous imprisoment for one month. The respondent appealed to the Sessions Judge, who set aside the conviction. In doing so the Sessions Judge relied on a decision of the Bombay High Court. The Provincial Government has filed the present appeal, which is an appeal against the acquittal, on the ground that the Sessions Judge had misread the judgment of the Bombay High Court.

It is abundantly clear that the Sessions Judge failed to appreciate what was said by the Bombay High Court. The case is *Emperor* v *Mahadev Mahalu* (1) and the facts there were these. A retail grocer had in his shop four pounds of sugar for sale. The police sent a person to buy one pound of sugar from him. The grocer refused to let him have more than one anna s worth of sugar on the ground that he wished to reserve the remaining quantity of sugar in his possession for retail sale to his regular customers. The Court held that on these facts the offence of withholding from sale had not been committed. It was quite reasonable for a retailer to refuse to sell a large part of his stock to one customer. In the course of his judgment in that case Beaumont, C. J. observed that in order to bring home the offence, the police would have to go much further than they had gone and show that the accused was over a period withholding his sugar from sale. The Sessions Judge has regarded this statement as meaning that before there can be a "withholding" from sale the "withholding" must extend over period. That is not the effect of the judgment when read as a whole. The learned Chief Judge said in an earlier passage that one must construe the word "withholding" in relation to the facts of each particular case, and with respect we agree. In the present case there was a flat refusal to sell even one box of

* 1945 M.W.N. 54

1. (1942) 44 Bom. L.R. 921

matches to the customer notwithstanding that there were large stocks in the shop. The Bombay decision has no bearing on the case now before us.

If the position rested there we should feel bound to allow the appeal but it had been pointed out to us that the notification of the Collector is defective and that the charge framed against the respondent was also defective. Clause (b) of sub-rule 2 of rule 81 of the Defence of India Rules does not relate to withholding from sale. The clause has reference to the controlling of prices. Therefore the Collector was not empowered by clause (b) to provide that a person selling matches commits an offence when he with holds matches from sale notwithstanding that he possesses saleable stock. If he had invoked clause (a) the notification would have been in order but clause a) was not invoked. This is no doubt the result of an oversight but it is an oversight which affects the validity of the notification. The charge against the respondent also made reference to clause (b). This naturally followed from the mistaken notification. There was was no offence under clause (b) but under clause (a) and he was not charged under clause (a). In the face of these technical defects we do not think we should be justified in allowing the appeal which will consequently be dismissed.

N. T. R. —— *Appeal dismissed.*

Cr. R. C. No. 833 of 1944
(Cr. R. P. No. 786 of 1944)
November 1, 1944
HAPPEL J.
P. S. Venkatasubbier & another*

Defence of India Rules, 1939, *Rule* 75 *A—If* ultra vires—*Government of India Act*, 1935. *Section* 102 *(1) &* 290. *Sch. VII, List II, Items* 9, 27 *&* 29.

Rule 75 A of the Defence of India Rules in so far as it authorises the requisition of immovable property is not ultra vires *the Government of India Act*, 1935.

The powers of the Provincial Legislature to make laws with respect to trade and commerce within the province and with respect to the "production, supply and distribution of goods" includes the power to requisition goods for public purposes.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the 2nd Additional 1st Class Magistrate, Trichinopoly, dated 17—10—1944 and passed in C. C. No. 490 of 1944.

* 1945 M. W. N. 55

V. T. Rangaswamy Ayyangar & K. Aravamudha Ayyangar, for Petitioner.

ORDER

The petitioners are being prosecuted before the 2nd Additional 1st Class Magistrate, Trichinopoly, for failure to comply with an order requisitioning their paddy stocks issued by the grain purchase officer, Trichinopoly, an offence punishable under Rule 75 (A) (7) of the Defence of India Rules.

The petitioners raised a number of preliminary objections to their trial which have been overruled by the Additional District Magistrate and the petitioners pray, in the petition now under consideration, that the order of the Additional District Magistrate be revised. Rule 75-A of the Defence of India Rules provides that the Central or the Provincial Government may requisition any property, moveable or immovable; and the principal argument advanced in support of the petition is that the provision for requisitioning movable property is *ultra vires* the Government of India Act. Section 102 (1) of the Government of India Act empowers the Governor-General, if he has declared by Proclamation that a grave emergency exists, to make laws for a Province with respect to any of the matters enumerated in the Provincial Legislative list; and it is said, since the acquisition of movable property is not a matter enumerated either in the Federal or the Provincial list Rule 75-A of the Defence of India Rules in so far as it relates to the requisitioning of movable property is *ultra vires* Section 102 of the Government of India Act. The argument is enforced by reference to Section 299 (2) of the Government of India Act, which provides that neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land etc., unless the law provides for compensation, and also by reference to the fact that the compulsory acquisition of land is emumerated as item IX of the Provincial Legislative list.

In my opinion the references to Section 299 of the Government of India Act and Item IX of the Provincial Legislative list do not assist the main argument, and the argument itself breaks down because the requistioning of movable property although not specifically enumerated in the Provincial Legislative list is clearly included in more general subjects which find a place in that list. Section 299 of the Government of India Act has no application because, in the present case, there is

no question of requisitioning without compensation; and the fact of the inclusion of the "compulsory acquisition of land" as a subject in the Provincial Legislative list does not mean that the acquisition of all other kinds of property is excluded. The acquisition of land is a matter with which Government are constantly concerned and it is natural that it should be placed in a separate category. If the other items are examined it is seen that in item 27 is included "trade and commerce" within the Province and in item 29 "Production, supply and distribution of goods". It has to be remembered that there is no limitation of the powers of Provincial Governments with respect to the subjects included in the Provincial Legislative List except in so far as the power is controlled by some provision of the Government of India Act. Section 297 of the Government of India Act does restrict the powers of Provincial Legislatures in regard to matters listed in items 27 and 29 in certain respects, but not in respect of the power to requistiion goods within the Province. The power of the Provincial Legislature to make laws with respect to trade and commerce within the province and with respect to the "production, supply and distribution of goods". I have no doubt, includes the power to requisition goods for public purposes.

The objection with regard to the validity of Rule 75 (A) of the Defence of Indian Rules in so far as it authorises the requisition of movable property is the only objection raised which, if accepted would justify the dismissal of the case *in limine*. It is argued that the grain purchase officer had, in any event, no power to require the delivery of the paddy to him. The manner in which delivery is to be taken of the paddy is a matter for evidence; and this and any of the other objections are matters which must be raised in the course of the trial.

For the reasons given above, the petition is dismissed.

ORDER

There is a question of law, but not in my opinion a substantial question; and, for that reason I did not admit the Criminal Revision Petition. Leave to appeal to the Federal Court is refused.

N.T.R.

Cr. R. C. No. 571 of 1944
(Cr. R. P. No. 543 of 1944.)

October 26, 1944

HAPPEL, J.

Chellakani Sahib & another.*

Gaming Act (Mad Act III of 1930), Sections 5 & 6—Presumption.

The Sub Magistrate wrote 'permitted' on the side of the application for permission to search the premises concerned by the Sub Inspector of Police.

Held *under Section 5 of the Gaming Act, the Magistrate must have reason to believe that a place is used as a gaming house before the warrant is issued, and that there was no guarantee that in the present case the Magistrate applied his mind to the question and had reason to believe that a warrant should be issued; that therefore no presumption under Section 6 could be drawn.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the judgment of the court of the 1st class Bench of Magistrates of Kokirakulam in B. C. No. 3014 of 1943.

A. S. Sivakaminathan, for the Petrs.
Public Prosecutor (V. L, Ethiraj) for Crown.

ORDER

The petitioner has been convicted of an offence under section 9 of the Madras Gaming Act and sentenced to a fine of Rs. 10 and to seven days' simple imprisonment in default of payment.

In my opinion the conviction cannot be sustained. It may be conceded that the petitioner was found with others playing cards for money in a room belonging to a dancing girl. For an offence under section 9 to be completed, however, the accused person must have been found gaming or present for the purpose of gaming in a common gaming house and for a room to be a common gaming house within the meaning of section 3 of the Madras Gaming Act, the cards, dice or other instruments of gaming must be kept or used for the profit or gain of the person owning or occupying the room. Section 6 provides that if a warrant has been issued under section 5, the cards, dice or other instruments of gaming found at the place shall be evidence that such place is used as a common gaming house. In the present case the Bench Magistrates do not seem to have drawn the presumption referred to in section 6. After referring to an argument stressed for the defence that the sub Magistrate did not issue a separate warrant under section 5,

* 1945 M.W.N. 56

of the Gaming Act, they say that no doubt that is true, but then go on to say that, in consideration of the specific evidence of P.Ws. 1 to 3 and the evidence of P.W. 4 it was clearly established that the house was a common gaming house. In my opinion the evidence of these witnesses does not establish that the room was a common gaming house since in the absence of the presumption under section 6 the evidence does not prove that the instruments of gaming were being kept for the profit or gain of the person owning the room. Moreover, it seems to me clear that the Magistrates, although I do not agree with their appreciation of the evidence, were right in not relying on the presumption that in appropriate circumstances may be drawn under section 6. All that the Sub Magistrate has done in this case, as appears from Ex. A is to write "permitted" on the side of an application for permission to search the premises concerned, in the case by the Sub Inspector of Police. Under section 5, the Magistrate must have reason to believe that a place is used as a gaming house before the warrant referred to in section 5 is issued, and Ex. A affords no guarantee that in the present case the Magistrate applied his mind to the question and so had reason to believe that a warrant should be issued.

The conviction is therefore set aside and the appeal is allowed. The fine, if paid, will be refunded.

N.T.R. —— *Conviction set aside.*

FULL BENCH

Referred Cases Nos. 47 & 49 of 1944

Jannary 8, 1945

SIR LIONEL LEACH, C.J., WADSWORTH & PATANJALI SASTRI, JJ.

The District Judge of Anantapur*
v.
K. V. Vena Reddi

Legal Practitioners Act (XVIII of 1879). Ss. 4 & 38—Bar Councils Act (XXXVIII of 1926). S. 14 (1)—Right of advocate of one High Conrt to practise in Couts subordinate to another High Court.

S. 4 of the Legal Practitioners Act has no application to advocates enrolled under the Bar Councils Act by any High Court and hence an advocate enrolled by any High Court is entitled by virtue of sub-section (1) of section 14 of the Bar Councils Act to practise in subordinate Courts of another High Court.

Cases referred by the District Judge of Anantapur it his letter dated 4th November 1944 and case referred by the District Judge of South Kanara in his letter dated 30th November 1944 for the decision of the High Court on the question whether an advocate who is enrolled in a High Court other than the Madras High Court, but who is not ordinarilly practising in such other High Court or in some Court subordinate thereto is entitled to practise in the Courts in the Madras Province, other than the Madras High Court.

Advocate General (P. V. Rajamannar) on behalf of the Crown.

S. Panchapakesa Sastri for the Advocates Association.

K. C. Subramania Chetti for the Bar Association.

Kasturi Seshagiri Rao & B. Sitarama Rao for Respts.

ORDER

(SIR LIONEL LEACH, C.J.)

These two references have been heard together and can conveniently be dealt with in one judgment. The first reference has been made by the District Judge of Anantapur and the question raised is whether the respondent, who is an advocate of the Bombay High Court, having been enrolled by that Court on the 13th September 1937, is entitled to practise in the Courts of the Anantapur district. Although he was enrolled by the Bombay High Court he has never practised in that Court or in any Court subordinate thereto. He has confined his practice entirely to the Courts of the Anantapur district, The second reference has been made by the District Judge of South Kanara. There are here three respondents and all of them were enrolled by the Bombay High Court after the Indian Bar Councils Act, 1926, came into force in that Province, as was the case in the first reference and they have since been practising in the Courts of the South Kanara district. These references have been made in consequence of the wording of section 4 of the Legal Practitioness Act. We shall refer to the section in a moment, but in passing we may say that if it stood alone a very difficult question would arise. The attention of the learned District Judges who have made these references has unfortunately not been drawn to an amendment to seciion 38 of the Legal Practitioners Act which was made by the Indian Bar Councils Act and when section 38, as amended, is taken into consideration it is quite clear shat these advocates are entitled to practise in the courts subordinate to this Court.

*1945 M.W.N. 101 : Cr. 3

Sub section (1) of section 14 of the Indian Bar Councils Act says:—

"An advocate shall be entitled as of right to practise:—

(a) subject to the provision of sub-section (4) of section 9, in the High Court of which he is an advocate; and

(b) save as otherwise provided by sub-section (2) or by or under any other law for the time being in force in any other Court in British India and before any other Tribunal or person legally authorized to take evidence; and

(c) before any other authority or person before whom such Advocate is by or under the law for the time being in force entitled to practice."

We are not concerned here with sub-section(2) which only refers to practice in High Courts. Therefore, an advocate enrolled by any High Court is entitled by virtue of sub-section (1) to practise in subordinate Courts of this province provided that there is no other law which prohibits him doing so.

Section 4 of the Legal Practitioners Act reads as follows:—

"Every person now or hereafter entered as an advocate or vakil on the roll of any High Court under the Letters Patent constituting such court or under section 41 of this Act or enrolled as a pleader in the Chief Court of the Punjab under section 8 of this Act, shall be entitled to practise in all the Courts subordinate to the Court on the roll of which he is entered and in all revenue offices situate within the local limits of the appellate jurisdiction of such Court subject, nevertheless to the rules in force relating to the language in which the Court or office is to be addressed by pleaders or revenue-agents; and any person so entered who ordinarily practises in the Court on the roll of which he is entered or some Court subordinate thereto shall, notwithstanding anything herein contained be entitled as such to practise in any Court in British India other than a High Court on whose roll he is not entered, or, with the permission of the Court or in the case of a High Court in respect of which the Indian Bar Councils Act, 1926, is in force subject to rules made under that Act in any High Court on whose roll he is not entered, and in any revenue office."

These references have been made by reason of the words "and any person so entered who ordinarily practises in the Court on the roll of which he is entered or some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled as such to practise in any Court in British India other than a High Court on whose roll he is not entered." The respondents have not ordinarily practised in the Bombay High Court or in Courts subordinate thereto and if the section stood alone, it would be doubtful whether they would be entitled to practise in Courts subordinote to this Court Section 38 of the Legal Practitioners Act makes it quite clear, however, that section 4 does not apply to advocates who have been enrolled under the Indian Bar Councils Act. The words "and except as provided by section 36, nothing in this Act applies to persons enrolled as advocates of any High Court under the Indian Bar Councils Act, 1926" were added to section 38 by section 19 of the Indian Bar Councils Act. Consequently section 4 has no application to advocates enrolled under the Indian Bar Councils Act by any High Court. That being the position, section 4 must be ignored, which means that so far as the respondents are concerned there is no other law for the time being in force which prohibits them practising in the subordinate Courts of this Province.

The references will be answered accordingly.

N.T.R.

Criminal Appeal No. 662 of 1944

December 19, 1944

MOCKETT & KUPPUSWAMI AYYAR, JJ.

The Public Prosecutor

v.

Pasala Venkata Reddi and another*

Evidence Act (1 of 1872), Section 27—Statement under—Proof of.

The correct procedure for the police officer, with reference to statements by accused persons which may be provable under section 27 of the Evidence Act, is to record in the first person the statement of the accused and, when he gives evidence, to say that the accused made a confessional statement, that he took it down, and then for the purpose of refreshing his memory, to refer to the actual statement in the police diary, and prove before the Court by that method what the accused had said.

Appeal under Section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondents (Accused) by the Sessions Judge of the Chittoor Division in Sessions Case No. 17 of 1944 on his file.

P. Govinda Menon, for Crown.

D. R. Krishna Rao & A. Bhujanga Rao, for accused.

JUDGMENT

(MOCKETT, J.)

This is an appeal by the Crown against the acquittal by the learned Sessions Judge of Chittoor of accused 1 and 2 in Sessions Case No. 17 of 1944 before him. It is possible for us to deal with this appeal very shortly because it has come to what may perhaps rightly be described as a somewhat sudden

*1945 M.W.N. 102

and dramatic end. The facts need only be summarised. It is in evidence that the two accused who were grazing goats were in the company of the two deceased men, Masthan Sahib, a forest guard, and Thimmiah, his watcher, in the Chalimamidi Reserve forest on the 31st December 1943. It is further in evidence that the accused resented the action of the deceased in objecting to what the deceased apparently thought was illegal grazing by the accused's goats. The deceased men disappeared, search was made and their bodies were eventually found.

The prosecution relied, it may be said, almost entirely, on a confessional statement alleged to have been made by the first accused and admissible under section 27 of the Evidence Act. No confessional statement is alleged to have been made by the second accused. In consequence of that confessional statement, says the prosecution, certain material objects were discovered which, taken with the confessional statement and the fact that the deceased men were last seen in the company of the accused and quarrelling, is enough to prove beyond all reasonable doubt that the accused murdered the forest guard and his watcher. That might well have been so had all the proof been forthcoming. There is no difficulty whatever about the proof of a confessional statement admissible under section 27. It should now be well-known that the procedure is that laid down by a Full Bench of this High Court in *In re Athappa Goundan* (1) where the learned Chief Justice remarked as follows :

> "Statements made by an accused person which are or may be provable under section 27 of the Evidence Act should be clearly and carefully recorded by the police officers concerned. They should be recorded in the first person that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. Obviously if what a man says is to be used in evidence, his own words should be used and not a rendering into the third person of the purport of his statement. With such a record of the statement before him it will then be for the trial Judge to decide how much of it is admissible under the section."

In other words, the correct procedure for the police officer is to record in the first person the statement of the accused, and, when he gives evidence, to say that the accused made a confessional statement, that he took it down, and then, for the purpose of refreshing his memory, to refer to the actual statement, which is of course in the police diary, and prove before the Court by that method what the accused had said. This aspect of the case seems to have been overlooked not only at the Sessions Court, but, it must be presumed, by those in Madras who advised the appeal. The only evidence of any confessional statement is contained in the following words by P. W. 24: "I questioned accused 1. He confessed and I recorded his confession and it was attested", and that is all we know. The confessional statement itself was never proved by the police officer in the Sessions Court. It is nowhere on record in these proceedidgs although questions relating to a detailed statement attributed to Accused I were put to him under section 342, Criminal Procedure Code, in the Committing Magistrate's Court. The result of course is that there was no evidence of any confession before the Sessions Judge and there is no evidence of any such confession before us. There is a brief statement by P.W. 2 relating to a bill hook which however had no blood upon it. It is true that the accused went on the scene with the police officer and certain panchayatdars who were called and went through a pantomine demonstrating how the murder was accomplished. But without any previous confessional statement, this is no more, if it was a confession at all, than a confession by him which would come within the provisions of section 25 of the Evidence Act. It might even have been a demonstration by him of how somebody else had committed the murder and how he had witnessed it. This no doubt may not be likely. But this is a criminal case on a charge of murder and here is nothing in his favour to which an accused person is not entitled. The appeal then must clearly fail and must be dismissed and the accused set at liberty.

It is not impossible that owing to the Public Prosecutor, Chittoor not seeing that his case was properly proved by putting in evidence its foundation has led to a failure of justice. It is unfortunate that the learned Judge did not notice that no confessional statement had been proved and we have no doubt that due note of this observation will be taken in the Sessions Court by those concerned; and possibly by the Inspector General of Police for the guidance of officers in other cases; but these matters do not concern the accused, who is on the other hand, entitled to take advantage of them.

N.T.R. — *Appeal dismissed*

1. (1937) M.W.N. 442 Cr. 74: I.L.R. Mad. 695 (728) F.B.

Cr. R. C. No. 479 of 1944
(Cr. R. P. No. 451 of 1944)
December 15, 1944
HAPPELL J.

P. Venugopal Mudaliar
v.
P. V. Neelakanta Mudaliar and others*

Criminal Procedure Code (V of 1898), Section 145—Tenant in possession—When possession of landlord,

Under Section 145 of the Code of Criminal Procedure the possession of a tenant can be treated as the possession of the landlord as against a rival landlord and a declaration can be given in favour of the landlord even though the tenant is not a party to the proceeding.

1938 *M.W.N.* 252: *Cr.* 41, dissented from.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional First Class Magistrate, Chingleput dated 3—3—1944 and made in M. C. No. 34 of 1943.

A. S. Sivakaminathan, for Petr.

Public Prosecutor (V. L. Ethiraj), for Crown.

T. V. Bhagavat, for Respts.

ORDER

This criminal revision petition is against the order passed by the Additional First Class Magistrate of Chingleput under section 145 of the Code of Criminal Procedure, in M. C. No. 34 of 1943. The petitioner in the present case was the petitioner in that case. The learned Additional First Class Magistrate found that the tenants of the petitioner were in possession. He considered, however, that he was unable to make an order declaring the petitioner to be in possession until evicted in due course of law because the tenants and not the landlord were in actual possession and because the tenants were not parties to the petition. For this view of the law he relied on the decision of Pandrang Row, J. in *Ranga Raju* v. *Jagannatha Rao* (1). It is true that in that case Pandrang Row J, refused to accept the contention that the tenants' actual possession is the landlord's actual possession and held that the first respondent in the case before him, even though his tenants were in possession would not be entitled to a declaration in his favour. With great respect, however, it does not seem that a decision on this point was entirely necessary to a decision of the case. The first respondent, it appears from the judgment itself, had sold a large portion of the land and so could not have been in possession himself by virtue of the possession of other persons. In *Ranga Raju* v. *Jagannatha Rao* (1) Pandrang Row J. referred to two decisions of the Calcutta High Court in *Agni Kumardas* v. *Mantozaddin* (2) and *Ambar Ali* v. *Priran Ali* (3). It was no doubt held in the first of those cases that the words "actual possession" meant actual physical possession even though wrongful, and in the second that 'actual possession meant possession in the sense of the possession of a man who has his feet on the land, who is sowing it and ploughing it and so forth. In neither of those cases, however, did the question arise whether the tenants' actual possession is the landlord's actual possession. The questions were whether wrongful possession could be actual physical possession and whether ineffective delivery of possession obtained in execution of a civil court decree or symbolical possession obtained in execution of such a decree could be recorded as actual possession. I know of no case in which a court has gone so far as to hold that a declaration under section 145 cannot be given in favour of a landlord as against a rival landlord where his tenants were found to be in actual possession on the date when the preliminary order was passed. As between a landlord and his own tenants there is authority for the proposition that the rule that the possession of the tenant is the possession of the landlord does not apply. See Weir's Rulings under the Code of Criminal Procedure (pages 11-107). But it seems implict in the ruling that as between rival landlords or between a landlord and the tenants of another landlord the ordinary rule will apply.

It is contended for the respondents that no difficulty would have arisen if the tenants had been made parties to the petition. No doubt, if the tenants had been parties, a declaration could have been given in their favour; but, if the tenants' actual possession cannot be regarded as the landlord's actual possession no declaration could be given in favour of the landlord. To the best of my knowledge it has been the practice of Courts in this Provivince in cases under section 145 of the Code of Criminal Procedure to treat the possession of a tenant as the possession of the landlord and to give a declaration in favour of the landlord even though the tenant is not a party to the proceedings; and I am not prepared to hold that this practice is illegal in default of authority which binds me. There may of course be

1. [1938] M.W.N. 252: Cr. 41
1945 M.W.N. 104

2. (1929) 56 Cal. 290
3. (1928) 55 Cal. 826

cases, as when the tenant has occupancy rights, in which a declaration in favour of the tenant may be best suited to the nature of the dispute. But if a declaration can never be given in favour of a landlord unless he himself is in possession in the sense that he is actually cultivating the land, the most unexpected and undesirable consequences may ensue. A landlord might find it difficult to evict a tenant while the order under section 145 was in force; or if the lease expired and the tenant did not renew, the landlord would be without protection against the opposite party. In my opinion, therefore, on the facts found by the Additional First Class Magistrate, a declaration should have been given in favour of the petitioner, and an order will accordingly issue declaring the petitioner to be entitled to possession until evicted in due course of law.

N.T.R.

Cr.R.C. No. 598 of 1944
(Case Referred No. 28 of 1944)
January 17, 1945
HAPPELL, J.

Mohila Doraiswami Naidu and another In re*

Criminal Procedure Code (V of 1898). Section 380 & 562—Enquiry under S. 380—Nature of.

When an accused person comes before a Magistrate under section 380, Cr.P.C., he can be treated only as a convicted person and the Magistrate is not empowered to set aside the conviction already recorded by the Magistrate who refers the case. The kind of enquiry of the nature of the additional evidence contemplated by section 380 is such an enquiry or evidence as may assit the Magistrate to whom the accused is forwarded to exercise his discretion properly under section 562 Cr.P.C.

Case referred for the orders of the High Court, under Sec. 438 of the Criminal Procedure Code by the District Magistrate of Chittoor in his letter Ref. D-1 1980 of 1944 dated 27—7—1944.

Assistant Public Prosecutor, (*N. Somasundaram*) for Crown.

ORDER

The Sub Magistrate, Puttur, in Criminal Case No. 422 of 1944 convicted two youths of offences under section 380 of the Indian Penal Code. The prosecution case was that the first accused, who was travelling in the same carriage as P.W. 1 picked P.W. 1's pocket of a purse as soon as the train stopped at Puttur Railway Station and passed the purse over to the second accused. P.W. 1 did not actually see the first accused taking the purse from his pocket but he says he saw him pass the purse to the second accused, and P.w. 2, a refreshment attendant says that he saw the first accused pick P.W. 1's pocked and pass the purse to the second accused. As the accused had not been previously convicted, the Sub Magistrate thought that the case was a fit one to be dealt with under the provisions of Section 562 of the Criminal Procedure Code and accordingly forwarded the two accused to the Joint Magistrate of Chandragiri. The Joint Magistrate was of opinion that the accused should not have been convicted and he requested the District Magistrate of Chittoor to address this Court to quash the conviction. The District Magistrate in the reference now under consideratton has recommended that the conviction should be set aside.

The learned Joint Magistrate appears to have been in some doubt as to whether he himself was not empowered after further enquiry to set aside the conviction, and in his letter to the District Magistrate he asks what is the nature of the enquiry contemplated within the meaning of section 380 if no enquiry could be conducted under section 380 Cr. P. C. which my upset the conviction. When an accused person comes before a Magistrate under section 380, he can be treated only as a convicted person and the Magistrate is not empowerd to set aside the conviction already recorded by the Magistrate who refers the case. Vide *Public Prosecutor* v. *Gurrappa Naidu* [1]. The kind of enquiry of the nature of the additional evidence contemplated by section 380 is clearly such an enquiry or evidence as may assist the Magistrate to whom the accused have been forwarded to exercise his discretion properly under section 562, Cr.P.C. In the present case, for instance the Sub Magistrate says that the accused are "young boys still in their teens" As boys are in their teens from the age of thirteen to nineteen, the Joint Magistrate might want to ascertain what the age of the youth really is.

So much for the question asked by the Joint Magistrate. As regards the reference it does not seem to me that it was necessary for it to have been made. The District Magistrate, it may be noted, says nothing at all on the merits. In my opinion, the appreciation of the evidence made by the Sub-Magistrate is to be preferred to the opinion of the Joint Magistrate. The joint Magistrate seems to

* 1945 M.W.N. 105

1. [1933] M.W.N. 716 : Cr. 104 : 57 Mad. 85

have accepted the explanation of the accused, which was not supported by any evidence that the first accused picked the purse up. Moreover, it is not correct to say, as he does, that the only evidence against the first accused is that of P. W. 2. P. W. 1 says that he saw the first accused hand the purse to the second accused. No doubt he does not say that he actually saw the first accused pick his pocket. But why, if the first accused had innocently picked the purse up from the platform, should he have immediately handed it to the second accused? P.W. 1's evidence, therefore, does corroborate the evidence of P.W. 2 and it seems to me that there are no adequate grounds for differing from the conclusion reached by the Sub-Magistrate that the prosecution had proved its case that the accused were guilty of the offence charged under section 380. The reference, therefore, is not accepted and the records will be returned to the Joint Magistrate through the District Magistrate, Chittoor to be dealt with in accordance with the provisions of section 562, Cr.P.C.

N.T.R. ——

Cr. R. C. No. 987 of 1944
(Cr. R. P. No. 920 of 1944)
January 17. 1945
MOCKETT, J.

Natesa Mudhaliar, In re*

Criminal Procedure Code (V of 1898), Section 35—Conviction under sections 457 and 380 Penal Code—Separate sentences.

The offences under section 457 and section 380 of the Penal Code are distinct offences and there is no prohibition to separate sentences being passed on a person convicted under sections 457 and 380 of the Penal Code. But such a course is not desirable when one sentence can be made to run concurrently.

Petition under Sections 435 and 439 of the Code of Criminal Procedure. 1898, praying the High Court to revise the Judgment of the Court of the Sub Divisional Magistrate, Saidapet, dated 14-11-1944 and passed in Cr. App. Nos. 24&25 of 1944 preferred against the judgement of the Court of the Stationary Sub Magistrate Saidapet dated 24—10—1944 and passed in C. C. No. 2499 of 1943

P. Kannan, for Petr.
Public Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER

The petitioner has been convicted under sections 457 and 380 of the Indian Penal Code. Section 457 of the Indian Penal Code concerns lurking house-trespass which is defined in section 443. It is house-trespass after taking precautions to conceal the house-trespass from the person who has a right to exclude the trespasser from the building. Section 380 of the Indian Penal Code concerns theft in a building. It should be clear that it is quite possible to commit the offence of lurking house-trespass without stealing anything at all just as it is possible to commit theft in a building without committing lurking house trespass. The offences are therefore quite distinct. A Bench of this Court has discussed this topic in connection with sections 147 and 323 of the Indian Penal Code, in the case reported in *in re Ponniah Lopes* (1). Bardswell, J. observes:

> "There has been a general agreement amongst all the High Courts except that of Lahore that if a person is convicted of rioting and of a substantive offence of hurt of some kind he can be awarded separate sentences and this is what was held by this Bench in a case reported as *Sothavalan* v. *Rama Kone* (2)."

With all respect to the learned Judges in *Mekhru Dusadh* v. *King Emperor* (3), I am unable to follow their ruling that a person convicted of house breaking followed immediately by theft could only be punished under section 457 of the I. P. C. It must be remembered that section 35 of the Code of Criminal Procedure was amended in 1923. So far as this High Court is concerned I am satisfied that there is no prohibition of separate sentences being passed in a case such as is now before me. I do not think, however, that such a course is desirable when one sentence can be made to run concurrently. In this case I am quite satisfied that the learned Judge intended to impose a sentence of eight months rigorous imprisonment. He has actually sentenced the accused petitioner to four months rigorous imprisonment on each count, the sentences to run consecutively. Under the circumstances I shall not interfere.

The petition is dismissed.

N.T.R. —— *Petition dismissed.*

FULL BENCH
Referred Case No. 50 of 1944
January 15, 1945
SIR LIONEL LEACH, C.J., LAKSHMANA RAO & KUPPUSWAMI AYYAR, JJ.

In the matter of a Pleader Bellary*

Legal Practitioners Act (XVIII of 1879), Section 13—Getting signature of client on blank paper—Professional misconduct.

1. (1934) M.W.N. 8: Cr. 1: I.L.R. 57 Mad. 643 (646)
2. (1933) M.W.N. 254: Cr. 46: I.L.R. 56 Mad. 481
3. (1926) A.I.R. Pat. 367

* 1945 M. W. N. 106 (1)

*1945 M.W.N. 106 (2)

It is most objectionable for practitioners to take their clients' signatures on blank sheets of paper. A practitioner who permits this to be done is guilty of unprofessional conduct.

In order to substantiate a charge of professional misconduct there must be evidence in support of it and suspicion, though strong, is not sufficient.

Advocate General (*P. V. Rajamannar*) on behalf of Crown.

V. S. Narasimachari for Pleader.

JUDGMENT

(SIR LIONEL LEACH C. J.)

The respondent is a pleader practising in the district of Bellary. He has been accused of professional misconduct in that he induced a client to sign blank sheets of paper in order that they could be used for the prepartion of a plaint, which would then be regarded as having been duly signed and verified by the client. The plaint was filed in the Court of the District Munsif of Bellary and as the District Munsif considered that the spacing of the document was such as to indicate that this had happened, he submitted the document to the District Judge who instituted these proceedings against the respondent.

We agree with the learned District Judge that it is most objectionable for practitioners to take their client's signatures on blank sheets of paper. For instance, when this is done in the case of a plaint there can be no proper verification as required by the Code of Civil Procedure. A practitioner who permits this to be done is undoubtedly guilty of unprofessional conduct.

The question here is whether the District Judge was justified on a mere perusal of the document in coming to the conclusion that the respondent had prepared the plaint on sheets of paper which his client had signed in blank. Undoubtedly the spacing of the document does give rise to strong suspicion, but suspicion is not sufficient. Both the respondent and the client have given evidence on oath that the client's signature on the pages of the plaint were written after the document had been prepared. In order to substantiate the charge of professional misconduct there must be evidence in support of it and we do not consider that the fact that the client's signatures appear at the bottom of pages 3 and 4 with considerable spacing above them is in itself sufficient to hold the respondent guilty of the charge preferred against him, The suspicion is strong, but that, as we have said, is not sufficient. There must be something more.

In these circumstances we are unable to follow the suggestion of the District Judge that the respondent should be censured and we dismiss the charge. But we may add that if such a charge were proved the Court would be called upon to consider whether a censure would be sufficient punishment for unprofessional conduct of this nature.

N.T.R.

Cr. R. C. No. 787 of 1943
(Cr. R. P. No. 733 of 1943)

October 25, 1944

HAPPELL, J.

Cherukuri Rami Reddi In re*

Evidence Act (I of 1872), Section 114, illustration (a) — If exhaustive — Penal Code (XLV of 1860), Section 411—Goods criminally misappropriated — Possession of— Presumption.

The illustration to Section 114 of the Evidence Act are not exhaustive. They do not restrict presumptions regarding the existence of facts to the facts covered by the illustrations.

A Court may presume that a person who is in possession of stolen goods soon after they have been criminally misappropriated, if he cannot account for his possession, misappropriated them or received them knowing them to have been stolen.

[1943] *M.W.N.* 580: *Cr.* 140, dissented from.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Kavali in C. A. No. 26 of 1943 (C.C. No. 965 of 1942 on the file of the court of the Stationary Sub Magistrate of Kovur).

V. Rangachari for Petr.

Public Prosecutor (*V. L. Ethiraj*) for Crown.

ORDER

The petitioner was the first of the three accused in C. C. No. 965 of 1943 on the file of the Stationary Sub-Magistrate of Kovur. All the accused were charged with offences under Sections 457 and 380 or Section 411 of the Penal Code. The 2nd and 3rd accused were acquitted. The 1st accused was convicted by the Stationary Sub Magistrate of an offence under Section 411 only and sentenced to undergo simple imprisonment for six months. On appeal the conviction and sentence were confirmed by the Sub-Divisional Magistrate of Kavali.

*1945 M.W.N. 107

The prosecution case was that P. W. 1—a well-to-do ryot of Kovur—on the morning of the 25th June 1942 found that seven bulls which he had tied up in a shed the previous night were missing. News reached him on the 26th that the bulls had been seen in the possession of the accused and on the 27th of June the bulls and the accused were detained at a village some thirty or forty miles from Kovur. The 2nd and 3rd accused are the servants of the first accused. The defence of the first accused was that he had purchased the bulls from P.W. 1, and he examined witnesses who support his defence.

There is no reason, in my opinion, to question in revision the view taken by both lower Courts that the evidence of the defence witnesses could not be believed. Apart from the fact that P. W. 1 did not know the first accused before and had no conceivable reason for bringing a false case against him, it is noteworthy that when he was first cross-examined on the 1st August 1942 the suggestion that the first accused had purchased the bulls from him was not put to him. It was only in the course of his further cross examination on the 8th of October 1942 that he was first asked whether the 1st accused had not bought the bulls from him for Rs. 700.

The Stationary Sub Magistrate, although he rejected the evidence for the defence, convicted the 1st accused only of an offence, punishable under Section 411 I.P.C. because, rather surprisingly, he did not believe that the bulls had been stolen from the shed. The reasons for his belief, the validity of which may well be doubted, need not be examined for the purposes of this revision petition. The Sub-Divisional Magistrate in his judgment confined himself substantially to a consideration of the evidence for the defence which, he was of opinion, had rightly been rejected by the Stationary Sub-Magistrate. He does not seem, however, to have noticed that the Sub-Magistrate had found that the bulls had not been stolen from the shed, or if he did notice it, he does not seem to have thought that it had any bearing on the propriety of the conviction under Section 411 of the Penal Code. He said merely after he had given his reasons for rejecting the case for the defence. "There is nothing improbable in the prosecution story. There is nothing wrong in the conviction under Section 411 I P.C." The Sub-Magistrate also does not seem to have thought that his finding that the bulls had not been stolen from the shed gave rise to any difficulties with regard to the charge under Section 411, I.P.C. He said "It cannot be said that the bulls were stolen from the shed. It is quite possible that the bulls might have strayed away having been kept loose in the fields" and he gives some effect to this finding when he finally concludes that accused 1 is guilty unde Section 411 I.P.C "of dishonestly receiving or retaining stolen property knowing or having reason to believe the same to be stolen; *or of dishonestly retaining it having received it honestly*". What he has really found, as appears from the judgment read as a whole, although he does not say so very clearly, is that the first accused must be presumed to have committed an offence punishable under Section 411 I.P.C. because he has not accounted for his possession of seven bulls which had been criminally misappropriated.

The argument pressed on me in support of the Revision Petition is based on the finding of the Stationary Sub Magistrate that the bulls were not stolen from the shed. It is argued, first, that if the bulls were not stolen it cannot be presumed under Section 114 of the Evidence Act either that the 1st accused was the thief or that he received the goods knowing them to have been stolen; and, secondly that it was not proved, that the bulls were criminally misappropriated or, if it is held that it was so proved, that the presumption which arises under Section 114 of the Evidence Act in regard to goods which have been the subject of theft does not arise in regard to goods which have been criminally misappropriated. In support of this argument I have been referred to a case decided by Kuppuswami Ayyar, J., *Venkataswami in re* (1). In that case certain persons who had sold cattle lost by the complainants to one of the witnesses in the case were convicted of offences under S. 379 or 411 of the Penal Code. The cattle, however had been lost owing to the scattering of a drive as the result of a rumour that there was a panther about, and consequently these was no theft. The question in the Criminal Revision Case was, therefore, whether in these circumstances a conviction under Section 411 could be sustained. Kuppuswami Ayyar, J. held that it could not. He was of opinion that the property obtained by the criminal misappropriation would be stolen property; but that no presumption could be drawn that a person in possession of property obtained by criminal misappropriation had received the property knowing it to be stolen because

1. (1943) M.W.N. 580; Cr. 140

possession until evicted in due course of law. Illustration (a) to S. 114 of the Evidence Act relates only to stolen property obtained by committing theft. With great respect I am unable to agree. The illustrations to S. 114 of the Evidence Act are not exhaustive. They do not restrict presumptions regarding the existence of facts to the facts covered by the illustrations. On the contrary, if a question arises as to whether the existence of a particular fact may be presumed the criterion must be in the words of S. 114 whether the Court "thinks it likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case". A Court may, in appropriate circumstances will, presume that a man who is in possession of stolen goods soon after the theft, is either the thief, or has received the goods knowing them to be stolen unless he can account for his possession, because if he cannot account for his possession he is likely to be the thief or to have received the goods knowing them to have been stolen. Under S. 410 of the Penal Code property which has been criminally misappropriated is designated "Stolen property" and there seems no logical reason why a man who is in possession of stolen goods soon after they have been criminally misappropriated, if he cannot account for his possession, should be regarded as less likely to have misappropriated them or to have received them knowing them to be stolen than if they had been the subject of theft. In the present case if, as the trial Court held, the bulls were not stolen they were clearly criminally misappropriated; and, as the explanation of the accused that he had purchased the bulls was rejected, it was correctly presumed at least that he had received the bulls knowing them to have been stolen. The conviction must have been for the criminal misappropriation of the bulls or, in the alternative, receiving them knowing them to be stolen. The conviction is, therefore, confirmed. The sentence is not too severe, and it may be remarked that the Sub-Magistrate has given no reason for imposing what appears, in the circumstances of the case, to be the wholly inappropriate sentence of simple imprisonment. The petition is dismissed.

S.K. — *Petition dismissed.*

Cr. R. C. No. 582 of 1944
(Cr. R. P. No. 553 of 1944.)
November 8, 1944.
HAPPEL, J.

Arunachala Goundan & others
v.
Chinnadorai alias Ramalinga Goundan*

Criminal Procedure Code (V of 1898), Section 145 (4) Proviso—Construction of.

Under the first proviso to clause (4) of Section 145, Cr. P. C., the person dispossessed can be treated as in possession on the date of the preliminary order only if he had been dispossessed within two months of that date.

52 *Mad.* 66, dissented from.

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the court of the Additional First Class Magistrate of Vellore dated 28—2—1944 and made in M. C. No. 24 of 1943.

A Bhujanga Rao for *T. R. Arunachalam* for Petr.

Public Prosecutor (V. L. Ethiraj) for Crown.

V. S. Rangaswami Ayyangar, for Respt.

ORDER

This case arises out of an order made under Section 145 of the Criminal Procedure Code by the Additional First Class Magistrate of Vellore. In his petition praying that the Magistrate should take action under Section 145, the respondent who may be referred to as the "A party" stated that he had been dispossesed by the "B party" on the 20th July 1943. The Magistrate, who declared in his final order that the A party was entitled to possession, issued a preliminary order under Section 145 (1) Cr. P. C. on the 10th November 1943. Under Sub-Sections 4 and 6 of Section 145 Cr. P. C., the Magistrate is bound to issue an order declaring the party which he finds to have been in possession on the date of the preliminary order to be entitled to remain in possession until evicted in due course of law, provided, that if the other party has been wrongfully dispossessed within two months of the preliminary order he may treat that party as in possession and issue the declaration in its favour. In this case, therefore, the B party were in possession when the petitioner filed his petition, namely on the 6th September 1943, and the petitioner on his own admission had been out of possession for more than two months before the preliminary order was made on the 10th November 1943. It would appear, therefore, that the Magistrate in this case had no alternative but to make an order declaring that the B party was entitled to.

† 1945 M.W.N. 109.

An argument has been pressed on me that the first proviso to Clause 4, Section 145, need not be construed strictly, and that the period of two months may in proper circumstances be extended in order that substantial justice shall be done. In support of this contention I have been referred to a decision of Devadoss J. reported in *Srinivasa Reddi* v. *Dasaratha Rama Reddy* (1). In so far as that decision tends to support the contention advanced for the petitioner, I am unable to agree with it, and the learned Public Prosecutor has referred me to a decision to the contrary effect of Jackson J. reported in *Pichai Moopan* v. *Narayana Swami Moopan* (2). This decision, in my opinion, gives effect to the plain words of the statute, namely, that the person dispossessed can be treated as in possession on the date of the preliminary order only if, he had been dispossessed within two months of that date. In the present case the 'B' party had been in possession for four months when the preliminary order was passed and the Magistrate was not empowered to treat the 'A' party as if they had been in possession at that date. The order of the learned Magistrate must therefore be set aside and a declaration will issue that the B party, namely, the petitioners in this criminal revision petition, are entitled to possession until evicted in due course of law.

N.T.R. —— *Petition allowed.*

FEDERAL COURT

(Appellate jurisdiction)

Cr. Appeal No. 7 of 1944

November 20, 1944

SIR PATRICK SPENS C. J. SIR S. VARADACHARIAR & SIR MD. ZAFRULLAH KHAN JJ.

A W. Meads v. The King Emperor*

Government of India Act (1935), Section 270 (1) —Proceedings civil and criminal-If includes Court Martial proceedings.

Proceedings of a Court Martial are not criminal proceedings within the meaning of Section 270 (1) of the Government of India Act, 1935

Appellant in person

Sir Brejendra Mitter (Advocate General of India) & *R. C. Soni* instructed by *K. Y. Bhandarkar* for Respt.

JUDGMENT.

(SPENS C. J.)

The appellant in this case A. W. Meads was in April 1943 a Captain holding, the temporary rank of Major in the Royal Engineers, and was attached to No. 1 Works Service (E & M) Group, I. E. In October 1943, he was charged with four offences under the Army Act. The charges without the particulars which are not material to this judgment were as follows :—

1st charge, Army Act S. 17—When on active service, when concerned in the care of public property fraudulently misapplying the same.

2nd charge, Army Act S. 40 (alternative to 1st charge)—When on active service, neglect to the prejudice of good order and military discipline.

3rd charge, Army Act S. 17—When on active service when concerned in the care of regimental property fraudulently misapplying the same.

4th charge Army Act S. 40 (alternative to 3rd charge)—When on active service neglect to the prejudice of good order and military discipline.

The appellant was ordered to be tried by a Field General Court Martial. He was in due course so tried and was convicted in respect of the two offences charged under S. 17 of the Army Act, and was sentenced to two years' imprisonment and to be cashiered.

The appellant thereupon filed a petition in the High Court at Lahore under S. 491 of the Code of Criminal Procedure. The important point raised on the hearing of that petition before the High Court was that the act complained of was committed by the appellant in the execution or purported execution of his duty as a servant of the Crown in India and that accordingly under S. 270 (1) of the Government of India Act, 1935, the Court Martial proceedings could not legally and properly be instituted against him without the previous consent of the Governor-General in his discretion.

S. 270 (1) runs as follows :—

"No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion."

The short but very important point so raised before the High Court at Lahore is whether the Court Martial proceedings in question were criminal proceedings within the meaning of S, 270 (1).

1. (1929) 52 Mad. 66
2. (1931) Mad. Cr. C. 168

*1945 M. W. N. 110

The petition under S. 491 of the Criminal Procedure Code was referred to a Full Bench of the Lahore High Court consisting of Sir Trevor Harries, C.J., Abdur Rahman and Mehr Chand Mahajan, JJ. In a very full and careful judgment it was decided on the 12th April, 1944, that the Court Martial Proceedings in question were not criminal Proceedings within S. 270 (1) and that there was no substance in this contention of the appellant. In his petition under S. 491, the appellant also took other points as to the validity of the manner of constitution and proceedings of the Field General Court Martial. These too were all carefully considered by the Full Bench of the High Court, who could find no legal substance in them. Accordingly on the 24th April, 1944, the petition of the appellant was dismissed, but a certificate under S. 205 (1) of the Constitution Act was granted in respect of the question raised in regard to S. 270 (1) and from that order the appellant has appealed to this Court.

The appellant appeared and argued his case in person before us. In the Court below it had been argued on behalf of the appellant that all Court Martial proceedings under the Army Act were criminal proceedings within the meaning of S. 270 (1). But it view of the amazing consequences which, it was pointed out by the High Court, must result if this contention were right the appellant before us limited his submissions and argued to the effect that (a) the acts on which the charges before the Court Martial were based were acts on which charges could have been framed under the ordinary criminal law of the land, (b) if the appellant had been charged under the ordinary criminal law of the land there was no doubt that the proceedings would have been criminal proceedings which could not have been instituted against the appellant without the previous consent of the Governor General in his discretion and (c) accordingly at least Court Martial proceedings in which a servant of the Crown in India was charged with offences in respect of acts which could equally be made the basis of a prosecution under the ordinary criminal law of the land, must be criminal proceedings for the purpose of S. 270 (1). There could be, it was suggested, no reason why if a servant of the Crown was proceeded against under the ordinary criminal law in respect of such acts he should be entitled to the protection afforded by S. 270 (1), whereas if he was proceeded against by Court Martial under military law he shoud be not entitled to such protection.

This Court has before now pointed out how difficult it is to make any logical grounds the basis of construing this section. It is a section which is capricious in its operation. For instance, had the appellant been employed in the affairs of the Province instead of having been employed in the affairs of the Government of India, there would have been no question now of s. 270 (1), having any operation at all. It is only because no Federation has hitherto been established that the question of the protection afforded by s. 270, sub-section (1) falls to be considered in respect of those still employed in connection with the affairs of the Government of India. We cannot therefore accept too readiiy as a help in construing this section logical considerations such as those stressed by the appellant.

Moreover whilst we agree that military officers are given by s. 270 just the same protection in proceedings instituted under the ordinary civil and criminal law as is given to other servants of the Crown such as police and civil servants, there seems no logical reason to assume that a similar protection should extend to the institution of proceedings under the military code which is applicable to and peculiar to those classes of citizens subject to the provisions of the Army Act, and which necessarily imposes on those subjeet to it obligations and liabilities to which others are not subject.

Further in order to succeed in his submission the appellant must somehow extract from the pharseology of S. 270 a difference in application or non-application according as Court Martial proceedings are in respect of acts on which charges under the ordinary criminal law could be based, or are in respect of acts on which no charge under the ordinary criminal law could be made.

In our view there is nothing to be found in the wording of the section to make a difference between Court Martial proceedings based on acts which constitute purely military offences under the Army Act and in respect of which no charge under the ordinary criminal law could be based, and the Court Martial proceedings based on acts in respect of which either military offences under the Army Act could be charged or ordinary criminal proceedings could be taken. In our judgment there is no halfway house. Either all Court Martial proceedings under the Army Act are criminal proceedings within S. 270 (1) or no Court Martial proceedings are. If all Court Martial proceedings under the Army Act are criminal

proceedings, there is no way to escape from the fantastic results which would follow from such a decision, and which have been indicated at some length in the judgment of the Lahore High Court. On the other hand, this Court has no right to base its deeision on construction solely on results. If words are plain and can bear only one meaning in law, results are not a matter for the Court, and there is no doubt that in some contexts the phrase criminal proceedings would be held to include Court Martial proceedings. See the speeches of their Lordships in the two cases, *In re Clifford & O' Sullivan* (1) and *Amand* v. *Home Secretary* (2).

The question for us is whether the phrase 'no proceedings civil or criminal' in the context in which it is used in s. 270 (1) of the ConstitutionAct should also be held to include Court Martial proceedings generally.

It was suggested on behalf of the Crown that if we were to hold that Court Martial proceedings were included in s. 270 (1) the result would be that s. 270 (1) would be an important modification or amendment of the Army Act, and the Advoeate General of India relied upon the terms of s. 2 of the Army Act, *viz.* "This Act shall continue in force only for such time and subject to such provisions as may be specified in an annual Act of Parliament bringing into force or continuing the same" as indicating an intention or policy of Parliament that the Army Act should not be modified or amended except by provisions specified in the annual Acts of Parliament extending the life of the Army Act. He accordingly submitted that Parliament could not have intended to make such an important modification or amendment in respect of procedure by Courts Martial by anything contained in the Government of India Act. Alternatively, if such modification or amendment had been made he argued that a similar provision should have been inserted in the next Army annual Act following the coming into force of the Constitution Act, and that the absence of any such provision indicated that no amendment or modification had been made. Whilst we are not prepared to differ as regards the possible intention or policy of Parliament as to the recognised convenient method of confining amendments to the Army Act to the annual Acts extending the same, there is no doubt of the competency of Parliament to effect amendments of the Army Act by any other Act of Parliament. The argument only goes to the unlikelihood of an important amendment or modification of this nature having been made by the Government of India Act rather than by some provision in an annual Army Act The argument is not therefore conclusive and we are left to construe the material words as we find them in their context in the Government of India Act without any really decisive help or authority from outside.

Whilst as indicated above it may be proper in certain contexts to include Court Martial proceedings in the phrase criminal proceedings, in our opinion the ordinary person who uses the phrase 'civil or criminal proceeding' usually intends only to indicate the ordinary civil and criminal proceedings which can be taken in accordance with the ordinary law of the land, and does not have in mind the special and peculiar code of Military law applicable only to the limited classes subject to it and the military offences created by that Code. In other words in our judgment the ordinary primary meaning of the phrase 'civil or criminal proceedings' indicates only the civil or criminal proceedings capable of being instituted under the ordinary law of the land, and should not be held to include proceedings under military law unless there be a context which so indicates. We can find no such context in S. 270 or elsewhere in the Constitution Act. Indeed there are indications in the context against giving the phrase any meaning other than its ordinary primary meaning. Sub-sec. (2) with its references to 'the court' and the recovery of costs and so forth is apposite enough to proceedings before the ordinary civil and criminal Courts, but is hardly apposite to proceeding by Courts Martial. Further, in support of our view of the meaning which we think would ordinarily be given to the material words, it is noteworthy that although S. 270 (1) has been in operation since the 1st April, 1937, during which time many Courts Martial must have taken place in this country, no one has hitherto suggested that the phraseology as used in S. 270 (1) includes proceedings under military law.

It may be true that the appellant might have been proceeded against in the regular courts on some charge under the ordinary Criminal law based on the Acts in respect of which he has been charged under military law, but he has at no time been proceeded against under the ordinary criminal law, and all the eharges with which he was charged before the Court Mar-

1. (1921) 2 A.C. 570
2. (1943) A.C. 147

tial were 'military offences' under sections of the Army Act. The whole proceedings against him have therefore been entirely under the Army Act and not in any way under the ordinary criminal law. In our judgment unless we are compelled by some authority or by something in the context to hold that such proceedings under the Army Act must be deemed to be included in the phraseology of S. 270 (1), it would be unreasonable for us so to do. We think that the words 'proceedings civil or criminal' have been used in their ordinary common meaning without any thought or reference to the Army Act, the Military Code, miiltary offences or proceedings by Courts Martial, and we are satisfied that even though possibly such phraseology in other contexts may be held capable of including military offences under the Army Act or proceedings by Courts Martial, we are not bound to hold that they do so in the case of S. 270 (1), and we are not prepared so to hold. Accordingly in our judgment the submissions of the appellant have no force and so far as this point is concerned the appeal must be dismissed.

We gave an opportunity to the appellant to raise any other matter on account of which he considered that the proceedings against him were invalid or his conviction unjustified. He raised no new points. The points which he argued before us were all raised on his behalf in the High Court and were dealt with most fully in the judgment of the Full Bench. He was unable to indicate any respect in which the judgment of the Full Bench could be considered wrong. We agree with the judgment of the Full Bench on these other points raised by the appellant and we consider it unnecessary in the circumstances that we should deal with them further ourselves. This appeal must accordingly be dismissed.

—— *Appeal dismissed.*

FEDERAL COURT

(Appellate jurisdiction)

Cr. App. Nos. 8 & 9 of 1944

December 13, 1944

SIR PATRICK SPENS, C.J. SIR S. VARADACHARIAR & SIR MD. ZAFRULLA KHAN, JJ.

M. L. Bannerjee & others v. Emperor*

Criminal Procedure Code (V of 1898), Section 137—Authority higher than a Provincial Government—Who is.

The expression 'higher authority' in section 197 of the Code of Criminal Procedure cannot be construed as meaning any officer of the Central Government Having regard to the juxtaposition in which this expression occurs and the history of the enactment, the expression has reference to the Central Government, the Governor-General and the Secretary of State.

Nor is the "G. H. Q." an authority higher than a Provincial Government within the meaning of S 197 of the Criminal Procedure Code.

J. P. Mitra & S. N. Mukerjee instructed by *Ganpat Rai & Sarcar Raghbir* instructed by *Ranjit Singh Nirula*, for Applts.

Sir B. L. Mitter & K. K. Raizada instructed by *Banerji*, for Respt.

JUDGMENT

(SPENS, C. J.)

These two appeals may by disposed of together. The appellant in Cr. App. No. 8 of 1944, Bannerjee, was in December, 1942, officiating Goods and Yard Supervisor at Sealdah, which is the Calcutta terminus of the Bengal-Assam Railway, and the appellant in Cr. App. No. 9 of 1944, Bhattacharjee, was at that time Shed Inspector at Sealdah. Bannerjee was then holding an Emergency Commission as a Second Lieutenant and Bhattacharjee had been made a Warrant Officer. They were charged under s. 161 read with s. 34. Indian Penal Code, with having received from Dud Nath Pandey (P.W. 2) on the 31st December, 1942, the sum of Rs. 250 as a motive or reward for allotting to the firm on whose behalf Pandey represented himself to be acting, a wagon for the transportation of bales of cloth frous Sealdah to Kisenganj. There were convicted by the Additional District Magistrate, 24 Parganas, and each of them was sentenced to undergo one year's rigorous imprisonment and to pay a fine of Rs. 500 and in default of payment of fine to suffer further rigorous imprisonment for three months. Their appeals to the Sessions Judge, 24 Parganas, and their revision application to the Calcutta High Court were dismissed. From the judgment of the High Court these appeals were preferred, supported by the usual certificate under s. 205 of the Constitution Act.

The constitutional question raised on behalf of the appellant before the High Court under s. 279 (1) of the Constitution Act was not sought to be re-agitated before us. It was conceded that it was concluded by the judgment of this Court in *Huntly's case* (1).

*1945 M.W.N. 113

1. (1944) M.W.N. 480; Cr. 102 F.C.R. 262

Some attempt similar to that in *Afzalur Rahman's case* (2) was made to raise a constitutional point on the construction of ss. 240 and 241 in order to support an argument really based on s. 197 of the Criminal Procedure Code that the cases must fail for lack of the necessary sanction under that section, inasmuch as the appellants were public servants who were not removable from their office save by or with the sanction of an authority higher than a Provincial Government, and the offence with which they were charged was alleged to have been committed by them while acting or purporting to act in the discharge of their official duty.

The appellants have in our judgment failed to establish that they were public servants who could be removed from their office only by some authority higher than a provincial Government. The only evidence on the record on that point is a statement by P. W. 4, Mozumdar, who is a District Traffic Superintendent on the Bengal Assam Railway, to the effect that the Goods Supervisor and the shed Inspector are subordinate to the Chief Transportation Manager and the Chief Commercial Manager who can jointly dismiss them. It was suggested that these officers, being officers of the Central Government were "an authority higher than a Provincial Government." We are unable to accept this suggestion. To construe this expression as meaning any officer of the Central Government would lead to patent absurdities. Having regard to the juxtaposition in which the expression occurs in s. 197 of the Criminal Procedure Code and the history of the enactment we consider that the expression has reference to the Central Government, the Governor General and the Secretary of State.

It was contended on behalf of Bannerjee that he had been a Commission as Second Lieutenant by virtue of his position as a Goods and Yard Supervisor and that as he could be deprived of his Commission only by G. H. Q., he could not be removed from his office of Goods and Yard Supervisor except with the sanction of G. H. Q., which was an authority higher than a Provincial Government. Beyond the fact that in December 1942 Bannerjee held an Emergency Commission as a Second Lieutenant there is not a word on the record to indicate that he could not be dismissed from his office of Goods Supervisor without the sanction of G. H. Q. Nor are we inclined to accept the proposition that "G.H.Q." (whatever that expression might signify) is an authority higher than a Provincial Government within the meaning of S. 197 of the Criminal Procedure Code.

A similar contention was sought to be raised before us on behalf of Bhattacharjee, but counsel realising that his case could not in this respect stand on any higher footing than that of Bannerjee, did not press the point. That may also be the reason why this point was not taken on his behalf before the High Court.

In our judgment it has not been established that the appellants are within the class of public servants to whom the provisions of S. 197 of the Criminal Procedure Code would be applicable. In this view of the matter it is unnecessary to determine whether the offence with which they were charged was or was not alleged to have been committed by them while acting or purporting to act in the discharge of their official duty.

We were, with our leave. also addressed on behalf of the appellants on the merits, but nothing that was urged before us served to raise any doubt in our minds with regard to the correctness of the findings of the Courts below. The evidence clearly establishes the guilt of the appellants beyond any reasonable doubt and the sentences are, in our judgment, appropriate. These appeals are dismissed.

—— *Appeal dismissed.*

2. (1943) M.W.N. 315; Cr. 49; F.C.R. 7

Cr. R. C. No. 710 of 1944

(Cr. R. P. No. 670 of 1944)

January 24, 1945

MOCKETT, J.

S. Jesudas Appadurai Pillai in Re *

Evidence Act (I of 1872), Section 157—"At or about the time"—Meaning of.

The words "at or about the time" in S. 157 of the Evidence Act mean that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself. Delayed statements are inadmissible. Section 157 cannot possibly contemplate the admission of a statement made long after the event. What is a reasonable time is a question of fact in each case.

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the judgment of the court of session of Coimbatore division dated 4-9-1944 and passed in Criminal Appeal No. 119 of 1944 preferred against the judgment of the Court of the Sub Divisional Magistrates, Coimbatore dated 21-7-1944 and passed in C.C. No. 95 of 1944.

† 1945 M.W.N. 114.

K. S. Jarayama Ayyar & T. R. Ramachandran, for Petrs.

Assistant Public Prosecuter (N. Somasundram) for Crown.

ORDER

The petitioner who is the Tahsildar of Tirupur Taluk was convicted under Section 161 of the Indian Penal Code for having received an illegal gratification of Rs. 120 from P.W. 1 for recommending him for a licence to trade in rice. He was convicted and sentenced to undergo rigorous imprisonment for two months and to pay a fine of Rs. 500. His appeal was dismissed by the learned Sessions Judge of Coimbatore. The facts are very simple. It is alleged that on the 10th May an application Exhibit A addressed to the Sub Collector of Pollachi was prepared by P.W. 1. On the 20th May he went to the Taluk Office with the petition and there the accused was present. P.W. 1 says that he learnt apparently from a peon that it was necessary to pay Rs. 100 if his petition was to succeed. This statement is of course hearsay, inadmissible and should not have been received in evidence. He borrowed Rs. 100 from P. W. 4 and handed Rs. 120 to the accused at his house on the 21st May, alternatively on the 23rd. The prosecution is not quite definite about this. Not having received his licence he made a complaint and then prosecution followed. P.W. 1, as the bribe giver was of course an accomplice with P.W. 4, and as a matter of expediency his evidence should be corroborated "in material particulars implicating the accused"; *Vyasa Rao* v. *The King Emperor* (1). The corroboration relied on by the prosecution was (1) that the petition was promptly dealt with. This implies that any Government servant who does his work promptly must have been bribed for the purpose-a cynical point of view which I must emphatically reject. (2) The evidence of P.W. 4 that P.W. 1 borrowed Rs. 100 from him on the 20th May and (3) the evidence of P.Ws. 2 and 3 described by the Magistrate as "very good corroboration". Their evidence was to the effect that at some time after the 21st May, P.W. 1 mentioned to them that he had paid this bribe. The magistrate thinks this incident occurred "a few days after" the payment. The learned Judge states very vaguely that it was "one day". The lower Courts both seem to have accepted as corroboration of P.W. 1's evidence the three circumstances mentioned. The most important evidence is that of P.Ws. 2 and 3. It is admissible if at all under section 157 of the Evidence Act as a statement made by P. W. 1 relating to the giving of the bribe "at or about the time" when it was given. Section 157 is a general exception to the common law rule of evidence that hearsay evidence is inadmissible. In England such statements made by witnesses are only admitted in the case of sexual offences against women and children. An "immediate complaint" made by the person assaulted can be admitted as corroborative of the complainant's credibility and as showing consistency of conduct. This is well established in *The Queen* v. *Lillyman* (2) and *The King* v. *Osborne* (3). In such cases the complaint must be made at the first opportunity or as Stephen's Digest of the Law of Evidence 10th Edn. 170 puts it "reasonably soon after the alleged offence". A consideration of the English cases with regard to what period was considered to be "reasonably soon" is instructive. In *Reg* v. *Kiddle* (4) there was a delay of three to four hours. In *The Queen* v. *Lillyman* (2) the period is stated to be "very shortly after". In *Reg* v. *Rush* (5) Wright J. observed that the lapse of time between the committing of the offence and the making of the statement was important and rejected a complaint made "a day after the offence was committed". In *Reg* v. *Ingrey* (6) Lord Russell of Killowen rejected a complaint made a few days after. The Court of Criminal Appeal in the case of *John Lee* (7) ruled that it must depend upon the circumstances of each case whether it could be said that the complaint was made "on the first reasonable opportunity which offers itself". These words are almost identical with those used by the Court of Crown Cases Reserved in *The King* v. *Osborne* (3). The wording of section 157 of the Evidence Act is to the effect that a statement must be made "at or about the time when the fact took place". There is a dearth of authority as to the meaning of "at or about the time". *Mangat Rai* v. *Emperor* (8) shows that proximity of time must be established. In *Emperor* v. *Ram Chandra Roy* (9) there was an interval of 20 hours between the event

1. (1911) 1 M.W.N. 327
2. (1896) 2 Q.B. 167
3. (1905) I K.B. 551
4. Cox's Crl. Law Cases Vol. XIX 77
5. 60 Justice of the Peace 777
6. 64 Justice of the Peace 106
7. 7 Crl. Appeal Reports 31
8. (1928) A.I.R. Lah. 647
9. (1928) A.I.R. Cal. 732

and the statement sought to be put in as evidence of corroboration. The Bench considered that this interval was too long and refused to admit the statement. Both these decisions with which I respectfully agree are based, as are the English cases, on the premise that in point of time the fact and the statement must be approximate. No Madras cases have been cited but I see no difficulty in understanding the words, I think that "at or about the time" must mean that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself. The object of the section seems to me to be to admit statements made at a time when the mind of the witness is still so connected with the events as to make it probable that his description of them then would be accurate. For example, if A returns to his house and says to a friend "I have just seen B in the Mount Road", and later the question arose whether B was in Madras on that day, the statement of A to his friend might be valuable corroborations of A's evidence that he in fact did see B on that day. The more familiar example is in murder cases when a witness who has seen a murder at once tells some third party what he has seen. But if time for reflection passes between the event and the subsequent statement it not only can be of very little value but may be actually dangerous, as such statements can be easily brought into being. Such delayed statements are in my opinion inadmissible. The section says that the statement must be made "at or about the time" not "at any time after the event".

The above important considerations when applying section 157 and admitting the evidence of P.Ws. 2 and 3 seems to have been wholly overlooked by the lower Courts. In the first place it was never ascertained when they were made. The learned Judge, as already indicated, was content to say that they were made "one day". An examination of the evidence of P.W. 2 indicates that the statement was not made until the end of September, long after the event. P.W. 2 says he was examined by the Sub-Collector 10 or 15 days after he met P.W. 1. According to Ex. C he saw the Sub-Collector on the 25th of September. The evidence relied on as corroborating P.W. 1 was unquestionably that of P.Ws. 2 and 3. I cannot suppose that either of the lower Courts would have acted on the corroboration of P.W. 4 alone who states that he lent Rs. 100 to the accused, a man whose name he did know and who made no note of the transaction. This is specially important in view of the fact that the cross-examination of P.W. 1 showed that his character as a witness was extremely dubious. It must be further observed that the fact of P.W. 1 borrowing Rs. 100 does not implicate the accused in the absence of reliable evidence that he received Rs. 100. It is interesting to notice that the accused had a number of prosecutions similar to this launched aginst him in 1943 all of which ended in acquittals. He states that he has been the subject of prosecution by the local Goundars who resented his activities as a Government servant during 1942 disturbance and after. That may or may not be so, but a consideration of this case shows that this conviction when examined rests entirely on the word of P.W. 1 who made no complaint until his licence was not forthcoming which may have been for good and sufficient reason. The corroboration relied on (assuming that an accomplice can corroborate himself under section 157 which I gravity doubt) was manifestly inadmissible. Section 157 cannot possibly contemplate the admission of a statement made long after the event. I am not attempting to lay down what is a "reasonable time", as this is a question of fact in each case. It is enough for the purposes of this case to hold that the statement of P.W. 1 to P.Ws. 2 and 3 was not made at the time of the event nor was it made at "about the time" which means within a reasonably short time after the event.

The petition is therefore allowed and the accused acquitted. The fine if paid will be refunded.

N.T.R. —— *Petition allowed*

Criminal Revision Case No. 752 of 1914
(Taken up No. 9 of 1944)
January 18, 1945

SIR LIONEL LEACH, C.J. & LAKSHMANARAO J.

Muthu Nadar In re

Penal Code (XLV of 1860), Section 53—Criminal Procedure Code (V of 1898), Section 383—Imprisonment till the rising of the Court—If valid—Criminal Rules of Practice, Rule 102.

A sentence of imprisonment till the rising of the Court is one in accordance with law. Unless the punishment section fixes a minimum, the Court has full discretion to pass a sentence of imprisonment for any period less than the maximum. A direction by the Court that a person shall be confined in the Court premises till the court rises constitutes imprisonment within the meaning of the Penal Code and the Criminal Procedure Code.

[1929] M.W.N. 114; Cr. 1 & [1942] M.W.N. 592; Cr 136 overruled.

Case taken up by the High Court on perusal of Calendar and Judgment in Sessions Case No. 82 of 1944, on the file of the Court of Session of the Tinnevelly Division dated 29—8—1944.

Public Prosecutor (V. L. Ethiraj) for Crown.

V. T. Rangaswami Ayyangar & R. Santanam for accused.

ORDER

[SIR LIONEL LEACH, C. J.]

The accused was found guilty by the Sessions Judge of Tinnevelly of an offence under section 323 of the Indian Penal Code and was sentenced to imprisonment till the rising of the Court. Under the provisions of section 439 of the Code of Criminal Procedure, Byers, J. called upon the accused to show cause why a sentence should not be passed upon him according to law. In *In re. Kunhi Bava* (1) Jackson J. had expressed the opinion that such a sentence was not in accordance with law and in *In re Ramalingayya* (2) Horwill J. had said the same. The question whether such a sentence is a sentence passed according to law has been fully argued before us and for reasons which we shall state we consider that these decisions must be overruled.

Neither the Indian Penal Code nor the Code of Criminal Procedure directs where a sentence of imprisonment shall be served. In most of the punishment sections to be found in the Indian Penal Code only the maximum period of imprisonment is stated, but in a few sections which related to offences of a very serious nature a minimum sentence is fixed. For instance, the minimum sentence for murder is transportation for life and for robbery or dacoity with attempt to cause death or grievous hurt it is seven years imprisonment. Unless the punishment section fixes a minimum, the Court has full discretion to pass a sentence of imprisonment for any period less that the maximum, for instance, for five minutes if this would fit the offence.

In the well-known case of *Bird* v. *Jones* (3) the question of what amounted to imprisonment was fully discussed. Coleridge, J. quoted the dictum of Coke that "every restraint of the liberty of a free man will be an imprisonment although he be not within the walls of any common prison" and Williams, J. quoted Blackstone's statement that "every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public street" (3 B. L. C 1 7) The definition of imprisonment to be gathered from these judgments was accepted by this Court in *P. Narasayya Pantulu* v. *Gapt R.A.C. Stuart* (4). It was there stated that the retaining of a person in a particular place or the compelling of him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action was an imprisonment on the part of the person who exercised that exterior will. Therefore, a direction by the Court that a person shall be confined in the Court premises till the Court rises constitutes imprisonment and in our judgment, imprisonment within the meaning of the Penal Code and the Criminal Procedure Code.

In *In re Kunhi Bava* (1) a person was convicted under sections 193, 196 and 471 of the Indian Penal Code and was sentenced to imprisonment till the rising of the Court and to a fine of Rs. 300. Dealing with the adequacy of this sentence, Jackson, J. said.

"When the statute lays down that for a certain offence, as for that under section 471, Indian Penal Code or under section 193, the punishment shall be imprisonment, it means that the offender shall go to jail and imprisonment till the rising of the Court is a clear evasion of that intention.

"Possibly in rare cases when the offence is obviously technical, a Court may be justified in taking the extreme step of evading the statute which it is appointed to administer; but on the learned Judge's own showing, this was not such a case."

1. (1929) M.W.N. 114: Cr. 1
2. (1942) M.W.N. 592: Cr. 136
3. (1845) 7 Q.B. 742 : 115 E.R. 668
4. (1865) 2 M.H.C.R. 396

* 1945 M.W.N. 181

It the learned Judge intended to lay down that where a person is convicted of an offence under any of these sections, the Indian Penal Code contemplates that ordinarily he shall be sentenced to imprisonment in jail, but where the offence is of a very technical nature the Court would be justified in passing a nominal sentence of imprisonment, we could understand him, but we cannot agree that the passing of a sentence until the rising of the Court would mean the evasion of the statute. If such a sentence amounted to an evasion, the Court would be wrong in passing it, because it would be illegal.

In *In re-Ramalingayya* (2), Horwill J. observed :

"Even in cases where the alternative of fine is not permissible by law, it is objectionable to sentence persons to imprisonment till the rising of the Court because it is not a form of imprisonment recognised by law, and is used to circumvent the provisions of law that require a sentence of imprisonment in jail for a particular term."

Horwill, J. did not refer to the judgment of Jackson, J. but he evidently had it in mind. The only difference is the use of the word "circumvent" instead of the word "evade."

Section 510 of the Indian Penal Code provides that a person who in a state of intoxication appears in a public place and there conducts himself in such manner as to cause annoyance shall be punished with simple imprisonment which may extend to twenty four hours. If such a sentence were passed, say for instance, by a Magistrate when in camp it might be impossible to send the accused person to a jail for such a short period. Is it reasonable to suppose that the offender could not lawfully be compelled to serve his sentence of imprisonment in some place other than a jail? The answer we give is emphatically in the negative.

Our attention has been drawn to section 383 of the Code of Criminal Procedure and we are told that it has been suggested that it indicates that a sentence of imprisonment must be undergone in jail. The section reads as follows :

"Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is or is to be confined, and, unless the accused is already confined in such jail, shall forward him to such jail with the warrant."

We certainly do not agree with the suggestion and consequently do not find in it any support for the opinion expressed in *In re Kunhi Bava* (1) and *In re Ramalingayya* (2). The requirement of the section that the Court passing the sentence shall forthwith forward a warrant to the jail in which the accused preson is to be confined merely contemplates the case where the Court intends the sentence of imprisonment to be undergone in Jail. It leaves entirely untouched the case where the Court passing the sentence directs that the imprisonment shall take place within the precincts of the Court.

The validity of a sentence of imprisonment till the rising of the Court is recognized in the Criminal Rules of Practice framed by this Court. The first paragraph of Rule 102 says :

"The Government consider the awarding of short-term imprisonments as undesirable and Magistrates, before passing such sentences, should consider whether imprisonments till the rising of the Court allowed by law could not appropriately be passed instead, or the provisions of section 562, Criminal Procedure Code, applied in favour of accused persons."

Of course, if a sentence till the rising of the Court were not one allowed by law, we should not be bound to have regard to this rule, but it was inserted after consideration and we do not doubt the wisdom which lies behind it. It may well be that a sentence of imprisonment until the rising of the Court should only be imposed in very exceptional cases, but where the facts warrant it we hold that the Court has power to pass it.

In the present case the Crown has made no suggestion that the sentence is inadequate, and we see no reason why it should not stand. The records will be returned to the Sessions Court.

N.T.R.

Cr. R. C. No. 780 of 1944
(Case Referred No. 46 of 1944)
January 19, 1944

SIR LIONEL LEACH, C. J. & SHAHABUDIN J.

Subbai Goundan and other In re*

Children Act (Madras Act IV of 1920), Section 5 (2)—Code of Criminal Procedure (V of 1898), Section 349 (1)—Several accused—One, a child or youthful person—Procedure for reference.

Where more accused than one are being tried together and one of them is a child or youthful person within the meaning of the Madras Children Act and the Magistrate is of the opinion that the child or youthful person should be dealt with under the Madras Children Act, which he himself is not empowered to do, the case falls within section 349 of the Code of Criminal Procedure; and therefore the Magistrate cannot convict any of the accused but must send all of them to the superior Magistrate.

*1945 M.W.N. 182

Case referred for the orders of the High Court under Sec. 438 of the Criminal Procedure Code by the District Magistrate of Coimbatore in his letter, Reference No. 46'8 of 44 dated 22-10-1944.

Accused not represented.

Public Prosecutor, (V. L. Ethiraj) for Crown.

ORDER.

(Sir Lionel Leach C. J.)

This reference has been made by the District Magistrate of Coimbatore under section 438 of the Code of Criminal Procedure. It raises a question with regard to the effect of section 349 when there are several accused and one of them is a child or young person within the meaning of the Madras Children Act, 1920.

Three persons were accused before the Stationary Sub Magistrate of Udumalpet with an offence punishable underS. 355 of the Indian Penal Code. The first and third accused were adults, the second accused was a boy of 14 years of age and therefore a "young person" within the meaning of the Children Act. The Stationary Sub Magistrate was of the opinion that all the accused were guilty of the offence with which they were charged and sentenced each of the adults to pay a fine of Rs. 40 and in default to suffer rigorous imprisonment for two months. He considered that the second accused should be dealt with under the Children Act and accordingly referred the case so far as the second accused was concerned to the Joint Magistrate, Pollachi, under section 5 of that Act. The Joint Magistrate was of the opinion that all the accused should have been sent to his Court and as they had not, the convictions of the adult accused were unlawful. He referred the matter to the District Magistrate who agreed with him. Hence this reference.

Sub-section (1) of section 349, Criminal Procedure Code states that whereever a Magistrate of the second or third class having jurisdiction, is of opinion after hearing the evidence of the prosecution and the accused that the accused is guilty and that he ought to receive a punishment different in kind from, or more severe than, that which he is empowered to inflict, he may record the opinion and submit his proceedings and forward the accused to the District Magistrate or Sub-Divisional Magistrate to whom he is subordinate. Sub-section (1-A) states that when more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of the accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub Divisional Magistrate. This sub-section was inserted in 1923 by the Amendment Act of that year, three years after the Madras Legislature had passed the Children Act. Therefore it must be assumed that it was inserted with knowledge of that Act.

The Stationary Sub-Magistrate was of the opinion that the second accused ought to receive a punishment different in kind from that which he was empowered to inflict. He had no power to deal with the second accused under the Children Act. Section 4 of that Act says that the powers conferred on Courts by it shall be exercised only by the High Court, a Court of Session, a District Magistrate, a Sub-Divisional Magistrate, a salaried Presidency Magistrate, a juvenile Court constituted under section 36, and a Magistrate of the first or second class specially authorised in that behalf. The Stationary Sub-Magistrate could have proceeded under section 562 (1-A) of the Criminal Proceedure Code and have released the second accused after an admonition. Evidently he thought that the second accused should not be dealt with so lightly and decided to make use of section 5 of the Children Act.

His action clearly fell within sub-sec- (1) of s. 349 of the Criminal Procedure Code, which meant that he could not convict any of the accused and was required to send all of them to the Joint Magistrate. It has been suggested that the Children Act stands quite apart from the Criminal Procedure Code and that it could never have been intended that section 349 of the Code should be applied when a Magistrate wished to have a child or youthful offender dealt with under the Children Act. In inquiring into the intention of the Legislature we can only have regard to the words used in the statute. There is nothing in the Criminal Procedure Code which passed a case in which there are several accused and one of them is a child or youthful person outside the provisions of s. 349 and the same observation applies to the Children Act. A decision to this effect was given by Lakshmana Rao, J. in *Emperor* v. *Mottayan alias Perumal* (1) and it follows from what we have said that we consider it to be right.

The conviction of the first and third accused by the Stationary Sub Magistrate must be set aside and he will be directed to send all the accused before the Joint Magistrate, Pollachi.

N.T.R.

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1. (1941) M.W.N. 768 : Cr.-96

Cr. A. No. 401 of 1944

January 23, 1945

CHANDRASEKARA AYYAR, J.

The Public Prosecutor

v.

Narayana Reddy and others*

Defence of India Rules (1939), Rule 119—Publicatirn of order—Mode of proof.

In prosecution for breach of orders made in pursuance of the Defence of India Rules, the prosecution has to show before relying on the order that there was publication of the order in accordance with what the authority, officer or person issuing it considered was best adapted for conveying information to the persons whom the order concerns. It is desirable that in such prosecution the order of the authority issuing the prohibitory order prescribing the manner of publication is also filed

It is not necessary that before there could be a conviction for violation of a prohibitory order, knowledge on the part of the accused of the prohibition must be shown in any particular manner. If the order has been published in the prescribed manner, it is not open to the persons who violate the order to plead ignorance.

Appeal under Section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondents (Accused N s. to 7 and 0) by the Additional ist class Magistrate of Anantapur in C. C. No. 111 of 1943 on his file

Public Prosecutor (*V. L. Ethiraj*) in person.

T. R. Subramanyan, S. Obul Reddi, A. Bhujanga Row & D. R. Krishna Rao, for accused.

JUDGMENT

This appeal is filed by the Provincial Government to challenge the view taken by the Additional First Class Magistrate of Anantapur that a mere notification of prohibition of transport of grain in the District Gazette was not enough but that knowledge of the prohibition must be brought home to the accused by publication of the order in the village or the locality by beating of tom tom or by other means. The First Class Magistrate is in my opinion, wrong when he states that before there could be a conviction for violation of the prohibitory order, knowledge on the part of the accused should be shown in any particular manner. Though it may be that the District Gazette or the Fort St. George Gazette is rarely read by people of this class, still statutes often prescribe or provide that such publication is enough notice and it is not open to persons who violate the law to plead ignorance.

*1945 M.W.N. 184

The real point which can be urged on behalf of the respondents is this, namely, that it has not been proved by the prosecution that the Collector who made the prohibitory order was of the opinion that the notification in the Gazette or publication of the order on the board of the taluk office was best adapted for informing persons whom the order concerned. Had he expressed such opinion and directed publication of the order on its basis, it is not open to courts to take a different view and say that another method would be better adapted for conveying information to the public. In other words, once he exercises his discretion as to the manner of publication, the discretion cannot be interfered with. But there is no proof in this case that he did say that publication in the District Gazette or in the board in the taluk office was enough. It may be that there is such an order but it has not been filed, and in its absence, we cannot assume that the authority who made the prohibitory order prescribed a particular mode of publication. It is for the prosecution to prove every link in the chain and if this order is not placed before the Court, no question of presumption will arise in favour of the prosecution to fill up the gap. Rule 119 prescribes that in the case of an order of a general nature or affecting a class of persons, the authority who makes the order shall publish notice of such order in such manner as may in his opinion be best adapted for informing person whom the order concerns. The prosecution has to show, before relying on the order prohibiting transport of grain, that there was publication of the order in accordance with what the authority, officer or person issuing it considered was best adapted for conveying information to the persons whom the order concerns. Otherwise it is possible, though not probable that the publication relied on is not the publication prescribed.

This point is noticed casually by the First Class Magistrate but is not dealt with by him at length as he proceeded upon the other ground, viz that the order despite publication in the Gazette or in the board of the taluk office was not within the knowledge of respondents and the villagers in the neighbourhood.

The appeal fails for this defect. I consider it desirable that in prosecutions under the Defence of India Rules the order of the authority issuing the prohibitory order prescribing the manner of publication is also filed so that there can be no technical objection of this kind.

S. K. —— *appeal dismissed.*

Cr. M. P. Nos. 883 and 892 of 1944
January 10, 1945
SIR LIONEL LEACH, C.J.
& SHAHABUDDIN, J.
T. V. Seshu Iyer and others In re*

Criminal Procedure Code (V of 1898), S. 403 —Autrefois acquit—*Trial under Oridinance II of 1942—Discharge or acquittal—Retrial under section 4 of Ordinance XIX of 1943.*

Petitioners with others were tried under the provisions of Ordinance II of 1942. First petitioner in Cr. M. P. No. 883 was discharged and the second and third petitioners were acquitted. The petitioner in Cr. M. P 892 was acquitted on appeal to the High Court. The Federal Court held in respect of the persons whose convictions were confirmed by the High Court that they should be retried in accordance with the provisions of section 4 of Ordinance XIX of 1943. All the accused including those who had been discharged or acquitted were re-arrested and proceedings were instituted against them.

Held *that having regard to the decision of the Privy Council holding that Ordinance II of 1942 was a valid enactment, the petitioners could plead* autrefois acquit *and that the proceedings against the petitioners should be quashed.*

Petitions praying that in the circumstances stated therein the High Court will be pleased to quash the order of committal of the petitioners herein (Accused 3 to 5 and 1) to the Court of Session of the East Tanjore Division at Negapatam dated 14—9—1944 and made in P. R. C. No. 1 of 1944 on the file of the Sub Divisional Magistrate's Court, Mayavaram.

V. Rajagopalachari, T. V. Ramanatha Ayyar & T. M. Kasturi, for Petrs.

The Advocate General (P. V. Rajamannar) & N. T. Raghunathan for the *Public Prosecutor (V. L. Ethiraj)*, for Crown.

ORDER

(Sir Lionel Leach, C.J.)

In 1943 the petitioners with others were accused of being members of a conspiracy to blow up a railway bridge. Charges were preferred under Rules 35 (1) (b) and (4) read with Rule 121 of the Defence of India Rules and under S. 126 of the Indian Railways Act read with Ss. 34, 435 and 511 of the Indian Penal Code. They were tried under the provisions of the Special Criminal Courts Ordinance, 1942 (Ordinance No II of 1942). The charge against the first petitioner in Criminal Miscellaneous Petition No. 883 of 1944 was not proceeded with and he was discharged. The second and third petitioners were acquitted. The petitioner in Criminal Miscellaneous Petition No. 892 of 1944 was convicted by the Special Judge, but acquitted by this Court on appeal.

In *King Emperor* v. *Benoari Lall Sarma and others* (1), the Federal Court held that certain sections of the Special Criminal Courts Ordinance, 1942, were invalid as they were *ultra vires*. The consequence was that the Governor-General promulgated the Special Criminal Courts (Repeal) Ordinance, 1943 (Ordinance No XIX of 1943). In *R. Subbarayan and others* v. *King Emperor*, (2) the Federal Court held in respect of the persons whose convictions were confirmed by this Court that they should be re-tried in accordance with the provisions of Section 4 of the later Ordinance. As the proceedings under the Special Criminal Courts Ordinance, 1942, were invalid all the accused including those who had been discharged or acquitted were re-arrested and proceedings were instituted against them in the Court of the Sub-Divisional Magistrate, Mayavaram. The Magistrate committed to the Sessions Court all the accused.

Since their committal the Privy Council (3) has reversed the decision of the Federal Court in *King Emperor* v. *Benoari Lal Sarma and others* (1) and held that the Special Criminal Courts Ordinance, 1942, was a valid enactment. In these circumstances the petitioners say that as they were discharged or acquitted by a lawful Court, the plea of *autrefois acquit* lies. The learned Advocate-General very properly says that this contention is well founded. The petitioners cannot be called upon to stand a second trial on the same charges.

The petitions are allowed and the commitment order in so far as it relates to these petitioners is quashed.

N.T.R. —

*1945 M.W.N. 185 (1)

1. (1943) M.W.N. 380:Cr. 76; 1943 F.C.R. 96
2. (1944) M.W.N. 232; Cr. 59: 1944 F.C.R. 161
3. (1945) M.W.N. 41: Cr. 1

Cr. R. C. No. 758 of 1944
(Case Referred No. 36 of 1944)
January 17. 1945
MOCKETT, J.
B. I. V. Rangarao In re*

Criminal Procedure Code (V of 1898), S. 403 —Charge nnder Ss. 467 & 420, I.P.C.— Acquitted under S. 420 and convicted under S. 467—Effect of, on appeal.

The accused was charged under S. 467 and S. 420, I P C., the allegation being that he forged a signature on a money order form and by impersonating the true owner cheated. The trial judge acquitted the accused of cheating, but convicted him of forgery. The accused appealed.

Held, *that the appellate judge could come to his conclusion with regard to the appeal against the conviction under S. 4[illegible] quite untrammelled by the fact that the acquittal under S. 420 stands. It may act as a plea in bar to further trial but does not in the least act as a plea in bar with regard to the facts in so far as they are relevant in considering the charge of forgery.*

Case referred for the orders of the High Court under S. 438, Cr. P. C. by the Sessions Judge of Vizagapatam Division in his order of reference dated 11-9-1944 and made in Cr. App. No. 100 of 1944 preferred against the judgment of the Assistant Sessions Judge of Chicacole in S. C. No. 34 of 1944.

Public Prosecutor (V. L. Ethiraj) for Crown.

ORDER

This is a reference by the learned Sessions Judge of Vizagapatnam under S. 438, Cr P.C. The accused was charged under S. 467, I.P.C. forgery, and S. 420, I.P.C. cheating, the allegation being that he forged a signature on a money order form and by impersonating the true owner cheated. The learned Assistant Sessions Judge of Chicacole acquitted the accused of cheating but convicted him of forgery. The accused appealed and the learned Sessions Judge appears to find himself embarassed by having on the record an acquittal which he considers inconsistent with the conviction He seems to think that while the acquittal stands, his hands are in some manner tied with regard to confirming the conviction. It is not so. The whole evidence is before the Court. He is entitled, if he thinks fit, to express his disagreement with the findings of fact in the acquittal although there being no appeal the acquittal still stands. He is not in the least bound by any finding of facts in the acquittal. The fact that the trial Judge was able to acquit of cheating and convict of forgery makes evident that this is not a case where on precisely the same facts a man is tried for two offences.

So far as this reference is concerned, Mr. Justice Burn in *Syed Ghulam Ghouse Sha Sahib Kadiri* v. *Emperor* (1) has held that this High Court will not, as a rule, interfere with acquittals in revision. In any case a Court can do no more than set an acquittal aside. The reference will be returned to the learned Sessions Judge with these observations. He can come to his conclusion with regard to the appeal against the conviction under S. 467 quite untrammelled by the fact that the acquittal under S. 420 I P C. stands. It may act as a plea in bar to further trial for cheating but does not in the least act as a plea in bar with regard to the facts in so far as they are relevant in considering the charge of forgery. This position frequently arises in the High Court in which there are appellants before us in cases where some of the other accused have been apparently quite wrongly acquitted on similar evidence.

N.T.R.

Cr. R. C. No. 4[illegible]7 of 1944
(Cr. R. P. No. 459 of 1944.)
December 19, 1944.
HAPPEL, J.
Mareedu Somaiah & others
v.
Emperor*

Abkari Act (Mad Act I of 1886), S 34—'Open place other than a dwelling house' —Meaning of.

The sub-inspector of excise obtained a warrant under S. 30 of the Abkari Act for search and in the course of the search arrested the fourth accused The place where the arrest was made was a yard attached to the dwelling house of the fourth accused; it was surrounded on all sides by a wall and access to the enclosure could be obtained only through a door. The accused were charged with offences under Ss. 225 and 225-B, I P C. and convicted

Held, *that the place in which the fourth accused was arrested was not an open place other than a dwelling house within the meaning of S. 34 of the Madras Abkari Act, that the arrest was illegal and that therefore the convictions were bad.*

Petition under Ss. 435 and 439 of the Cr.P.C. 1898 praying the High Court to revise the judgment of the court of session of the Kistna Division at

1. (1933) M.W.N 878 (1): Cr. 139

*1945 M.W.N. 185 (2)

*1945 M.W.N. 186.

Chilakalapudi dated 24—2—44 and passed in Cr. App. 4 of 1944 (C. C. No. 36 of 1943 Sub-Divisional Magistrate's Court Gudivada).

V. G. Krishnamurthi, for Petrs.

Assistant Public Prosecutor (*N. Somasundaram*) for the Crown.

ORDER

This criminal revision case arises out of C C. No 36 of 1943 in the court of the Sub Divisional Magistrate of Gudivada which was itself a case, although the convictions were made under sections of the Indian Penal Code which arose out of a search carried out under the provisions of the Madras Abkari Act. The facts were these. The Sub Inspector of Excise Gudivada, obtained a warrant from the Stationary Sub Magistrate, Gudivada, under S. 30 of the Madras Abkari Act for the search of the house of D.W. 6. He proceeded to carry out the search on 11-12-1942 with his two peons, P.Ws. 3 and 4 and a panchayatdar whom he took with him, P.W. 2. The search does not appear to have been entirely unanticipated as on their arrival, while they were standing outside the wall of the yard attached to the house, they saw from the door of the yard the fourth accused run out of the house carrying a bottle. P.Ws. 3 and 4 got over the wall and P.W. 3 caught hold of the fourth accused Thereafter, according to the evidence, the other accused, came out of the house and accused 1 and 2 tried to rescue the fourth accused while the third accused at a later stage threatened the party with violence if they attempted to enter the house. On these facts, the first and second were convicted of an offence under S. 225, I.P.C. and the fourth accused of an offence under S. 225 (b). The third accused was acquitted. On appeal to the Sessions Judge of Kistna, the convictions were confirmed but the fines which were imposed by the lower Court were reduced to Rs. 50 in the case of each of the accused 1 and 2 and to Rs. 30 in the case of the fourth accused The learned Sessions Judge took the view that the charges were made out but that resistance had not been very serious. There was evidence that justified the findings that the fourth accused escaped from arrest and that the first and second accused assisted her escape, and the findings of the lower Courts on these points cannot be challenged in revision.

The argument put forward in support of the revision petition, an argument that was also advanced in the lower courts, is that the convictions were bad because the arrest of the fourth accused was itself illegal. It is conceded that s. 31 of the Madras Abkari Act does not apply and that the arrest was made under s. 34. S. 34 provides that:

"Any Officer of the Abkari, Salt, Police, Land Revenue or Customs Departments and any other person duty empowered may arrest without warrant in any public thoroughfare or open place other than a dwelling house any person committing an offence punishable under S. 55 or S. 57 or S. 58 of the Act.

There is no clear description of the enclosure in which the arrest was made to be found in any one place in the evidence of the witnesses. It appears, however, from the evidence of P. Ws. 1 and 2 that the place where the arrest was made was a yard attached to the dwelling house of the fourth accused, that it was surrounded on all sides by a wall (a fairly high wall as two of the peons got on to a bandy in order to get over it) and that access to the enclosure could be obtained only through a door or perhaps doors.

The wording of s. 34 is rather curious as it is surprising on a first impression to find the words "open place" used as if they might include a "dwelling house" A reference, however, to the definition of a "place" given in s 3 (20) of the Act affords some guidance as to the meaning that must have been intended by the legislature to be attached to the words "open place" It is stated in s. 3 (20) that "place" includes also "a house, a building, shop, tent and vessel." The only authority for the interpretation of the words to which learned Counsel have been able to refer me is contained in a note to s. 34 of the Abkari Act in the fifth edition of the Madras Law Journal's Edition of the Civil Court Manual Reference is there made to 2 P R. 22 (Cr) 2 Cr.L R. 212. The report referred to does not appear to be available in Madras. But the note on the report is "the word "open" is opposed to "closed" A private open ground attached to a house, though enclosed by walls, but which has an opening having no door is an "open" place within the meaning of S. 34. This seems to me to be correct. An arrest without warrant connot be made under s. 34 of the Act in a dwelling house but it may be made in any other place and place includes a house, building, shop, or vessel provided that the place is open. The difficulty in each case will be to decide, if the place is not a dwelling house, whether it is "open". The learned Sessions Judge refers to a note in the Madras Excise Manual volume I at page 19 to the effect that the words "open place" used in this section include an open shop, building

or house other than a dwelling house. The note, of course, is no authority for the interpretation of the section; but for the reasons given above, the statement that "open place" used in this section includes an open shop, building, or house other than a dwelling house is correct. The learned Sessions Judge, however, begs the question when he goes on immediately to say "clearly an open yard comes within this description," although he is right in his view that the yard is not a part of the dwelling house. The question is whether the yard is an "open" yard within the meaning of S. 34. In my opinion it is not. As far as a picture of it can be made from the evidence the yard is attached to the house, entirely surrounded by fairly high walls, accessible only through a door, and not "open" to the public. To hold this to be an open place, it seems to me, is virtually to ignore the qualification of "place" by the word open, and to read S. 34 as if it said simply that an arrest could be made without warrant anywhere except in a dwelling house. In my opinion therefore, and I am dealing of course only with the facts of this case, the place in which the fourth accused was arrested was not a public thoroughfare or open place other than dwelling house within the meaning of S. 34. In that view, the convictions of the accused were bad and must be set aside.

The petition is allowed and the fines, if paid, will be refunded.

N.T.R. — *Petition allowod.*

PRIVY COUNCIL.

(Appeal from Lahore.)

December 6, 1944.

THE LORD CHANCELLOR, LORD RUSSELL OF KILLOWEN, LORD PORTER, LORD GODDARD & SIR MADHAVAN NAIR

Pandit Krishori Lal

v.

The King Emperor*

Criminal Law—Sentence—Transportation for life—Convict not transported—Period served with remission earned amount to 14 years—If entitles convict to release—Cr. P. C. (V of 1898), S. 368 (2)—Prisoners Act (III of 1900.)

The appellant was sentenced to transportation for life. He was kept in the Central Jail, Lahore and was dealt with in the same manner as if sentenced to rigorous imprisonment. His sentence was never commuted under S. 55, Penal Code or S. 402 (1), Cr. P. C. to one of rigorous imprisonment. On 1st July, 1943 the appellant had earned remission and if the amount thus earned were added to the term he had actually served, the aggregate would have exceeded 14 years and he contended that as he had all along been subjected to rigorous imprisonment, he cannot be made to serve longer than a term which aggragated with the period of remission earned amounted to 14 yearas, that being the maximum permitted by law.

Held, *that the Government can confine a prisoner sentenced to transportation in any prison appointed by them for that purpose, there to be dealt with as though sentenced to rigorous imprisonment but that does not affect the sentence of the accused unless it has been commuted.*

Transportation is but a name given in India to a sentence for life and in a few special cases for a lesser period and a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners, where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment.

S. 368 (2) Cr. P. C. enacts that no sentence of transportation shall specify the place to which the person is to be transported. Ss. 29, 31 and 32, Prisoners Act make it plain that when a sentence of transportation has been passed, it is no longer necessarily a sentence of transportation beyond the seas.

D. N. Pritt K. C. & R. K. Handoo for Applt.

G. D. Roberts, K. C. & J. M. Pringle for Respt.

JUDGMENT

LORD GODDARD. On 7th October, 1930, the appellant was convicted before the Special Tribunal set up under Ordinance III of 1930 of certain offences, including those of waging war against the King, contrary to section 121 of the Indian Penal Code, and of murder, contrary to section 302. For these offences he was sentenced to transportation for life which is the only sentence, other then death, which can be awarded for these two crimes. After conviction he was imprisoned in the Central Jail at Multan and in January, 1936, was transferred to the Central Jail at Lahore. On 29th August, 1932, the Home Secretary to the Government of the Punjab wrote to the Inspector-General of Prisons saying that the Governor in Council agreed that the appellant, on the score of his crime,

*1945 M. W. N. 188

was unsuitable for transporation to the Andamans, adding that "he cannot be deported as a terrorist as the Government of India has not so far addressed any communication authorising the Punjab Government to deport terrorists there." The Andamans is the only place outside the mainland of India to which convicts sentenced to transportation are sent and it is not in dispute that this letter signified the intention of the Government not to transport the appellant overseas but to keep him imprisoned in India. In fact, he has ever since been kept in the Central Jail at Lahore, and has there been dealt with in the same manner as if sentenced to rigorous imprisonment. His sentence has never been commuted under S. 55 of the Penal Code, or S. 402 (1) of the Code of Criminal Procedure, to one of rigorous imprisonment. While there is no section either in the Penal Code, or in the Code of Criminal Procedure, which says in terms that no sentence of rigorous imprisonment is to exceed 14 years, it is the fact that in no case where rigorous imprisonment is prescribed as the punishment is the maximum term longer than 14 years and, by a proviso to S. 35 (2) of the latter Act, consecutive sentences of imprisonment cannot amount in the aggregate to more than 14 years. So it can be said with truth that when the Code enacts that an offence shall be punishable by rigorous imprisonment as the sentence it cannot exceed that period. The only sentence known to the law which can exceed 14 years is one of transportation for life and, with two exceptions where transportation is a part of the sentence, the term is always for life. Convicts serving this sentence may be granted remission for good conduct, and for the purpose of calculating remission in the case of life sentences it appears that in India they are treated as sentence of 20 years. This is no doubt the reason why S. 57 of the Code provides that for calculating a fractional part of a life sentence it should be treated as one of 20 years.

On the 1st July, 1943, the position was that the appellant had earned remission and, if the amount thus earned were added to the term he had actually served, the aggregate would have exceeded 14 years but would not have exceeded 20 years. On that date he applied to the High Court at Lahore for an order in the nature of a *habeas corpus* under S. 491 of the Code of Criminal Procedure, claiming that he had justly served his sentence and should therefore be released. His application was refused by Monroe J. on 13th July. On appeal the High Court held that they had no jurisdiction to entertain it as being one in relation to a criminal matter, and it is conceded that this view was correct. Subsequently, special leave to appeal to His Majesty in Council from the order of Monroe J. was granted as it was clear that a question of importance and some difficulty was involved.

The appellant's main contention was, and is, that as he has all along been subjected to rigorous imprisonment he cannot be made to serve longer than a term, which, aggregated with the period of remission earned, amounts to 14 years, that being the maximum term of rigorous imprisonment permitted by law. He also contends that the Government by causing him to be dealt with in the same manner as if sentenced to rigorous imprisonment must be deemed to have commuted his sentence under S. 55 of the Penal Code The contention of the Government is that they can confine a prisoner sentenced to transportation in any prison appointed by them for that purpose there to be dealt with as though sentenced to rigorous imprisonment, but this does not affect the length of the sentence unless it has been commuted, and the present appellant's sentence never has been commuted. It is therefore necessary to examine the various statutory provisions dealing with the sentence of transportation.

Section 53 of the Penal Code sets out six different punishments to which offenders are liable. The second of these is transportation and the fourth imprisonment of two descriptions, rigorous and simple. As already stated, where the Penal Code prescribes transportation as the punishment, the sentence, with two exceptions, must be for life By S. 55 in every case in which a sentence of transportation for life shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced, may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding 14 years. S. 58 provides that in every case in which a sentence of transportation is passed the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment. Were these the only statutory provisions dealing with the mrtter, there would be much force in

the argument that S. 58 should be read as providing merely for the temporary or transitory detention and treatment of an offender while arrangements were being made for his transportation beyond the seas. If the history of the sentence be examined there is no doubt that when first enacted transportation meant transportation beyond the seas. When framing the Penal Code, the draughtsmen undoubtedly intended this sentence to remain as one whereby those on whom it was passed should be sent overseas. This appears in the introduction to the Code, the author of which was Mr.—afterwards Lord Macaulay, then Legal Member of Council and a principal draughtsman of the Act. The Code was drafted about 1836 but was not enacted until 1860 and at that time also the sentence involved the convict being sent out of India. In 1836 transportation was a common sentence in England for felony and one reason for thinking that section 58 was intended by the authors of the Code to provide only for temporary detention of prisoners awaiting transportation is that the English Act 24 Geo. IV, Ch. 84, which consolidated, the law of this country relating to transportation contained a very similar provision. Shortly stated that Act provided that the sentence should always be one of transportation or banishment beyond the seas; that places on land or vessels in the river (commonly called the hulks) should be appointed for the confinement of prisoners until they could be placed on a convict ship and that until they could be removed to such places they were to be kept to hard labour in the common jail or house of correction and the time spent there was to be counted towards their sentence. Opinions, however, on matters of penology change from time to time in all communities, and no one doubt, the competency of the legislature to adopt and provide for new and enlightened methods in the treatment of prisoners and management of penal establishments, even if the result be to change entirely the character of the punishment from that which has hitherto prevailed. In England transportation beyond the seas ceased as a punishment in 1854. In India it is still part of the penal system, but Acts passed since the Penal Code have effected so radical a change in the law relating thereto that whatever may have been the case in 1860 section 58 can no longer be construed as providing only for the transitory detention of prisoners awaiting conveyance to a penal settlement outside India. A sentence of transportation no longer necessarily involves prisoners being sent overseas or even beyond the provinces wherein they were convicted. The first provision to notice in this respect is section 368 (2) of the Code of Criminal Procedure, 1898, which enacts that no sentence of transportation shall specify the place to which the person sentenced is to be transported. Then comes the Prisoners Act of 1900 as amended in 1903 which, in the opinion of their Lordships, is the decisive statute on the point. Section 29 in its amended form provides as follows:—

"(1) The Governor-General in Council may by general or special order, provide for the removal of any person confined in a prison . . .

(b) Under or in lieu of a sentence of imprisonment or transportation . . . . . to any other prison in British India.

(2) The Local Government and subject to its orders and under its control the Inspector General of Prisons may in like manner provide for the removal of any person confined as aforesaid in a prison in the province to any other prison in the province".

By section 31 the Governor in Council may order the removal of a person sentenced to transportation from the prison in which he is confined to any other prison in British India. By section 32, as amended in 1920, the Local Government may appoint places within the province to which prisoners under sentence of transportation shall be sent and the Local Government or an officer authorised by them shall give orders for the removal of such persons to the places so appointed except where sentence of transportation is passed on a person already undergoing transportation under a sentence previously passed for another offence. Since 1937, all the above powers can now be exercised by Provincial Governments.

The effect of the concluding words of section 32, sub section 1 seems to be that if a prisoner has been actually transported and then is sentenced on a subsequent charge he is to remain where he is and not be removed thence to a place within the province. The Central Jail at Lahore, in which the appellant is confined is one of the prisons constituted as a place for the detention of transportation prisoners, These sections make it plain that when a sentence of transpotation has been passed it is no longer necessarily a sentence of transportation beyond the seas. Nowhere is any obligation imposed on the Government either of India or of the Provinces to provide any places overseas for the reception of prisoners. It appears that for many years

the only place to which they have been sent is the Andaman Islands, which are now in Japanese occupation. Their Lordships have been referred to various orders and directions of an administrative and not a legislative character showing what prisoners are, and are not, regarded as fit subjects for transportation thereto, and showing also that nowadays only such of those prisoners sentenced to transportation as may volunteer to undergo transportation overseas are sent to those islands. Learned commentators on the criminal law of India, in particular Lord Macaulay, in the introduction to the Penal Code to which reference has already been made, have pointed out that a sentence of transportation is one likely to be regarded with particular terror by Hindoos, largely because of their dread of crossing "the black water" the loss of caste which a journey overseas entails and of the uncertainty whether they will ever see their homes again. No doubt therefore, the sentence has been preserved for its deterrent effect and because in certain cases it may be both useful and desirable to send convicts to the islands. But at the present day transportation is in truth but a name given in India to sentence for life and, in a few special cases, for a lesser period, just as in England the term imprisonment is applied to all sentences which do not exceed two years and penal servitude to those of three years and upwards. A convict sent to penal servitude may nowadays serve his sentence either in a prison known as a convict establishment or in an ordinary local prison and in the latter he will be subject to exactly the same discipline, conditions of labour and treatment generally as those sentenced to imprisonment. So, in India, a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment. The appellant was lawfully sentenced to transportation for life; at the time when he made his application to Monroe J, he was confined in a prison which had been appointed as a place to which prisoners so sentenced might be sent. Assuming that the sentence is to be regarded as one of 20 years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application and it was therefore rightly dismissed but, in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than 20 years or that the convict is necessarily entitled to remission.

A further point was taken by Mr. Pritt on behalf of the appellant to which brief reference may be made although in view of the opinion of their Lordships on the main question, it has now become immaterial. On the assumption that the sentence was to be regarded as one of not more than 14 years' rigorous imprisonment, he contended that taking into account the remission earned, the appellant would have been entitled to be discharged at the time when he made his application to the learned Judge under sub-paragraph 2 of the Government of India Resolution No 234-245 of 12th July 1910, and Provincial Government endorsement No. 236 of 25th August, 1910, reproduced as paragraph 647, sub paragraph 2, in the Punjab Jail Manual. In view of sub-paragraph 1c the Board caused an enquiry to be made of the Punjab Government whether any order had been passed by them forbidding the prisoner's release. In reply the Government referred to a letter of the 24th March 1942, from the Deputy Secretary to the Government Home Department to the Inspector-General of Prisons in which the former requested that the roll of the convict might be resubmitted for the further consideration and orders of Government in the first week of March, 1943. That is not an order under the paragraph to which reference has been made and if the sentence had in law to be regarded as one of 14 years' rigorous imprisonment it appears to their Lordships that the prisoner would have been entitled to be discharged. But, for the reasons given, their Lordships are of the opinion that at that time he was inlawful custody, and still is, and they will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissod.

Criminal Revision Case No. 850 of 194 .
(Criminal Revision Petition No. 799 of 1944)
March 2, 1945.
HAPPELL J.
S. Ramakrishnan and another In re*

Press Emergency Powers Act (XXIII of 1931), Section 2 (6)—News sheet – What is.

For matter published or commented on to fall within the definition of 'news-sheet' in section 2 (6) of the Press (Emergency Powers) Act, there must be an element of novelty about it. If a pamphlet discussed matter which at the date of the publication of the

*1945 M. W. N. 205.

pamphlet was not a very recent event and had become matter of history, it might well be said that the pamphlet was not a news-sheet within the meaning of the Act.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Fifth Presidency Magistrate of the Court of the Presidency Magistrates Egmore, Madras, dated 6—7—44 and made in C. C. 951 of 1944.

K. Bashyam & J R. Gundappa Rao for Petrs.

The Crown Prosecutor (P. Govinda Menon) for the Crown.

ORDER

The petitioners have been convicted by the learned Fifth Presidency Magistrate of an offence punishable under section 18, sub-section (1) of the Press (Emergency Powers) Act, and have been sentenced each to pay a fine of Rs. 10 or in default to undergo simple imprisonment for two weeks.

The petitioners were the author and the printer and publisher respectively of a pamphlet headed "A clarion call by the Tamil Nadu Students' Federation". The publication of the pamphlet was not authorised by a Magistrate and the conviction of the petitioners has been based on the finding that the pamphlet is a news sheet within the meaning of section 2 sub-section (6) of the Press (Emergency Powers) Act, the publication of which requires the authorisation of the Magistrate. Section 15 (1) of the Act provides that

"The Magistrate may, by order in writing and subject to such conditions as he may think fit to impose, authorise any person by name to publish a news-sheet, or to publish news-sheets from time to time".

and section 18 (1) enacts that;

"Whoever makes, prints or otherwise produces sells, distributes, publishes, or publicly exhibits or keeps for sale, distribution or publication, any unauthorised news-sheet or news-paper, shall be punishable with imprisonment which may extend to six months, or with fine, or with both".

The definition of the word "news sheet", given in section 2 (6) is this:

"'News-sheet' means any document other than a news-paper containing public news or comments on public news or any matter described in sub-section (1) of section 4".

The prosecution proceeded on the footing that the pamphlet in question did not contain any of the matter described in sub-section (1) of section 4. The only question therefore which the learned Magistrate had to consider was whether the pamphlet was a news sheet as contemplated by the Act. It is argued on behalf of the petitioners that the pamphlet does not contain public news and that consequently such comment, as there is not comment on public news It is said that the pamphlet merely uses the fact of the Bengal Famine to illustrate the importance of food supplies and the necessity for suppressing hoarding. It is more profitable to consider in each individual case whether the publication in question falls within the definition, having regard to the ordinary meaning of words, than to explain the definition by substituting for it some other form of words; but it may be conceded that for matter published or commented on to fall within the definition, there must be an element of novelty about it. If, therefore, the pamphlet did, in fact, contain nothing but a discussion of food problems and the necessity for suppressing hoarding enforced by reference to the Bengal Famine, which at the date of the publication of the pamphlet was not a very recent event and had become matter of history, it might well be said that the pamphlet was not a news-sheet within the meaning of the Act. The pamphlet, however, does not merely refer to the famine as a historical fact It contains references to the condition of the people of Bengal resulting from the famine at the date when the pamphlet was written. Moreover the pamphlet is a voluminous document which refers to other matters which undoubtedly consitute public news and on which comment is made. For instance, as the learned Crown Prosecutor points out, reference is made towards the end of the pamphlet to the result of the Parlimentary election in England for the Skipton Constituency, —a result which was quite recent and which would certainly not have been known to the majority of the readers of the pamphlet if their attention had not been drawn to it in the pamphlet. This is clearly public news and comment is made on it. I have no doubt therefore that the pamphlet does contain public news and comment on public news and that consequently the decision of the learned Fifth Presidency Magistrate was correct The Magistrate did not take a serious view of the unauthorised publication and has passed a light sentence.

The petition is dismissed.

N.T.R. — *Petition dismissed.*

Cr. R. C. No. 705 of 1944
(Cr. R. P. No. 665 of 1944)
November 15, 1944
HAPPELL, J.

Vadakke Valappil Ammotty and another
In re*

Food Grains Control Order, Clause 3 (1)—Defence of India Rules, Rule 81 (4)—Purchase in wholesale quantities without licence—Offence.

The purchase of foodgrains in wholesale quantities without a licence and nothing more contravenes clause 3 (1) of the Food Grains Control Order. A mere purchase is also an engagement in an undertaking which involves the purchase.

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the North Malabar Division, dated 16—3—1944 and passed in Criminal Appeal No. 6 of 1944 and preferred against the Judgment of the Court of the Joint Magistrate of Tellicherry dated 23—2—1944 and passed in C.C. No. 32 of 1944.

C.K. Viswanatha Ayyar, for Petr.

Public Prosecutor (V. L. Ethiraj), for Crown.

ORDER

The petitioners were convicted by the Joint Magistrate of Tellicherry of an offence punishable under R. 81 (4) of the Defence of India Rules read with Clause 3 (1) of the Food Grains Control Order and sentenced to undergo 4 months' rigorous imprisonment and to pay a fine of Rs. 500. On appeal the Sessions Judge of North Malabar confirmed the conviction, but reduced the sentences to the period of imprisonment already undergone and fines of Rs. 25 and Rs. 50 respectively.

The charge against the petitioners was that they had purchased 86 bags of paddy without a licence and so had contravened clause 3 (1) of the Food Grains Control Order. The Joint Magistrate was of opinion that they had made the purchase for purposes of trade, but the learned Sessions Judge considered their case from the point of view that the purchase was for their own use or for their own use and that of other villagers. He confirmed the convictions because, in his opinion a purchase of grain in wholesale quantities without a licence contravened clause 3 (c) of the Food Grains Control Order and so constituted an offence punishable under R. 81 (4) of the Defence of India Rules. Clause 3 (1) of the Food Grains Control Order states :

"No person shall engage in any undertaking which involves the purchase, sale, or storage for sale, in wholesale quantities of any foodgrains except under and in accordance with a licence issued in that behalf by the Provincial Government."

The words "engage in any undertaking" have caused some difficulty. In Criminal Appeal No. 934 of 1943, an appeal against an acquittal by the Provincial Government, Horwill, J. held that storage for sale was not *per se* an undertaking and that for the mischief of clause 3 (1) of the Order to be attracted it must be proved that the storage was for the purpose of fulfilling a contract. In *Uduman Taraganar* v. *Emperor* [1] Kuppuswami Aiyar, J. expressed dissent from this view. He pointed out that an undertaking might be an unilateral act ; and that if a person stored foodgrains in wholesale quantities for sale "in future under contracts to be entered into in the future" he will be guilty of the offence punishable under Rule 3. In Criminal Appeal No. 935 of 1943 *Public Prosecutor* v. *Venkayya* [2] the learned Chief Justice and Shahabuddin, J. had occasion to consider these two decisions and expressed agreement with the decision of Kuppuswami Aiyar, J. It is argued now that *Uduman Taraganar* v. *Emperor* [1] does not cover the present case because in that case the person concerned was a trader and to store foodgrains in wholesale quantities for sale under contracts to be entered into in the future is to engage in an undertaking within the ordinary meaning of those words ; whereas to say that the mere purchase of foodgrains in wholesale quantities is to engage in an undertaking deprives those words of any significance. There is some force in this contention ; but, nonetheless, the conclusion seems to me inescapable that the purchase of foodgrains in wholesale quantities without a licence and nothing more does contravene Cl. 3(1) of the Food Grains Control Order. In order to attract the mischief of the section there does not have to be any combination of purchase, sale, or storage for sale. There are three separate prohibitions against undertakings which involve (1) the purchase of food grains in wholesale quantities without a licence (2) the sale of food grains in wholesale quantities without a licence and (3) the storage for sale of food grains in wholesale quantities without a licence. And, as it has been held that no antecedent contract or arrangement is necessary in order that a purchase, sale or storage for sale may be an undertaking within the meaning of clause (3)

*1945 M.W.N. 247

1. (1944) M.W.N. 444; Cr. 116
2. (1944) M.W.N. 603: Cr. 139

it is difficult to see how any effect is to be given to the prohibition against the purchase of foodgrains in wholesale quantities unless a mere puchase is regarded as an engagement in an undertaking which involves the purchase. It may perhaps seem that this construction reduces the words "engage in any undertaking which involves" to mere surplusage, and that if the construction is right the clause would better have read "No person shall buy, sell or store for sale, etc." On the other hand the Provincial Government may well have intended to include in the prohibition transactions more complicated than straight forward purchases and sales. But, however, that may be, it is not an abuse of language to say that a person who makes a purchase engages in an undertaging which involves that purchase; and this construction does give unequivocal effect to the separate prohibition of the purchase in wholesale quantities of foodgrains without a licence.

In my judgment therefore for the reasons given the convictions are correct. There is no justification for interfering with the sentences which, as reduced by the Sessions Judge, are lenient.

The petition is dismissed.

N.T.R. —— *Petition dismissed.*

Cr. R. C. No. 854 of 1944

Cr. R. P. No. 803 of 1944

January 25, 1935

HAPPELL, J.

R. Ramachandran in re*

Coffee Stealing Prevention Act (Madras Act VIII of 1878), Section 10—Permission under, not in proper form—Liability for.

Where the owner has given his express permission in writing under sec. 10 of the Coffee Stealing Prevention Act, the person carrying the coffee cannot be convicted simply because the permit is not in the prescribed form. The person to blame for the fact that the permit is not in the prescribed form would appear to be the owner rather than the person to whom the permit has been given.

Petition under Sections 435 and 439 of the Code or Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Coonoor in C. A. No. 11 of 1944 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Coonoor in C. C. No. 1067 of 1944.

N. T. Raghunathan & M. Ramchandran, for Petr.

Asst. Public Prosecutor (N.Somasundaram), for Crown.

* 1945 M.W.N. 248

ORDER

The petitioner has been convicted of an offence under section 10 of the Coffee Stealing Prevention Act and has been sentenced to pay a fine of Rs. 20 and to forfeit $17\frac{3}{4}$ measures of coffee. The petitioner was evidently charged with this offence because he was found carrying the coffee in the neighbourhood of an estate in the Nilgiris. He explained however that he had bought the coffee from a merchant in Mettupalayam and that he was taking it to Tanjore. Moreover, he produced a permit in respect of the coffee which had been given to him by a Mettupalayam merchant. The Stationary Sub-Magistrate of Coonoor convicted the accused on the ground that he admitted the offence, his only defence being that he was not aware of the rules. The record shows that the petitioner did not admit the offence. What he said was :—

"I have got a pass for the purchase of the coffee from C. A. Khader Sahib Rowther and Co., Mettupalayam. I brought the same from Mettupalayam to Ooty and kept it there, and when I found time to go to Tanjore I took it with me. I did not get a pass from the Controller."

There was no need for the petitioner to have a pass from any Controller, and it is obvious that he did not understand in what the offence consisted. The learned Joint Magistrate of Coonoor on appeal accepted the petitioner's statement that he bought the coffee in Mettupalayam and that the permit which he produced was given to him by the vendor, but he was of opinion that the conviction had to be confirmed because the permit which was given to the petitioner and which he produced did not contain all the required particulars.

It is clear that the petitioner should not have been convicted. Section 10 of the Coffee Stealing Prevention Act states that :

"No person shall carry or remove coffee from any coffee estate..........without the express permission of the owner or of his authorised agent."

The section then goes on to provide that the permission shall be in writing and that it shall contain certain particulars which are set out. If the owner has, in fact, given his express permission, and in this case it has been accepted that the owner, viz , the Mettupalayam merchant did this, the person carrying the coffee cannot be convicted simply because the permit is not in the prescribed form. The person to blame for the fact that the permit is not in the prescribed form would appear to be the owner rather than the person to whom the permit has been given. The petitioner in this case committed no

offence, and his conviction and the sentence passed on him must be set aside. The fine, if paid, will be refunded and the coffee forfeited will be returned to him.

N.T.R. —— *Conviction set aside.*

Criminal Revision Case No. 696 of 1944
(Crminal Revision Petition No. 657 of 1944)

December 19, 1944.

Mockett, J.

J. Beckett & others

v.

Mrs. Wendy E Norris*

Penal Code (XLV of 1860), Section 499, Exception 9—Club—Breach of rule by wife of member—Complaint by committee to husband in good faith—No offence—Statement of accused—Entitled to consideration.

The complainant was not a member of the Club but as the wife of a member was privileged to use the club. Acting on the report of the Secretary and the servants of the club, the Committee wrote a letter to the husband of the complainant that the complainant had broken the rules of the club, by being with persons in a prohibited part of the club and by endeavouring in breach of the rules to provide persons with alcohol, who were not permitted to consume it in the club. The Committee informed the husband that in the event of any further breach of the rules they would withdraw from the wife the privilege of using the club. The members of the Committee were prosecuted for defaming the complainant by writing that letter to her husband.

Held, *that the Committee of the club having acted in good faith and with due care and attention were protected by Exception 9 to section 499, I.P.C.*

In criminal proceedings due consideration must be given to the statement of the accused themselves.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the City Magistrate of Madura dated 23–6–1944 and passed in C. C. No. 144 of 1944.

C. Krishnaswami Ayyar for *Messrs. King* and *Partridge*, for Petrs.

P. Govinda Menon & N T. Raghunathan, for the *Public Prosecutor* on behalf of the Crown.

C. R. Pattabhiraman, C. V. Nilakantan & N. Koteswara Rao, for Respondent.

ORDER

The petitioners are the committee members of the Kodaikanal Club. They have been convicted of defaming Mrs. Norris, who, as the wife of a member, is privileged to use the club under R. IV, cl. 2 of the Club Rules. She is not of course a member of the club. The penalty imposed by the learned Magistrate was a fine of Rs. 10 on each accused. This is a most unfortunate case in many respects. The complainant was no doubt (although dealing with her own countrymen) entitled to avail herself of the remedy by prosecution rather than by civil action in damages. The effect has been curious in a community used to, what I will describe as, the right rather than the privilege of giving evidence on oath. Although it has been of the utmost importance in this case that they should (the burden of proof being cast upon them) be able to give evidence on oath, the accused have been prohibited from doing so owing to the proceedings being in a criminal forum. I will return to this aspect of the case later.

The facts are as follows :— The Kodaikanal Club has opened its door to members of the Services—Officers are honorary members and on two nights a week, the dance room is thrown open to British other Ranks of His Majesty's forces. The other ranks are confined to the dance room and are prohibited from using certain other rooms of the club of which the reading room is one. They are also (no doubt for good and sufficient reasons) not allowed to consume intoxicating liquors in the Club. Mrs. Norris receives a number of British other Ranks at her house "Speke" as paying guests at a small charge, and there is no doubt that she is much interested in their entertainment and welfare. On the 28th October 1943, by Ex. G, the Honorary Secretary, on behalf of the committee, wrote to the complainant's husband Dr. Norris in Ceylon pointing out that Mrs. Norris at about 9-15 p. m. on the 26th October was in the reading room before the fire with other Ranks. It was pointed out that the presence of other Ranks as guests was restricted to the recreation room on Tuesdays and Fridays from 7-30 to 10-30 p.m. The letter concludes "The Committee will be glad if you and Mrs. Norris will observe this rule in future". By Ex. G-1, Dr. Norris acknowledged Ex. G. and apologised saying that he was in no doubt that the breach of the rule by his wife was due to inadvertence. On the 10th February 1944, the alleged defamatory letter by the Honorary Secretary (Ex. A), was sent to Dr. Norris, who was still in Ceylon. It reads as follows :—

"Dear Sirs,

On 29—10—43 as instructed by the committee I wrote to you on the subject of your wife having

* 1945 M.W.N. 249

introduced non-members (B. O. Rs.) into the club. On that occasion the President personally spoke to your wife and explained to her the breach of the rules which she had committed.

You replied in your letter, dated 3—11—1943 expressing regret in the belief that your wife had acted inadvertently in ignorance of the rules.

I am now directed by the committee to bring to your notice that on the night of Tuesday, February 1st 1944, a member of the Committee found your wife and several R. A. F. (B. O. Rs.) drinking in the reading room of the club—a place, which they are not allowed to enter. The Committee also learns that on the after-noon of 8th February 1944, your wife was also seen in the reading room along with a B. O. R. On the same night after the dance a servant of the club reported that your wife was with several B. O. Rs. in the reading room and she asked for them to be served with intoxicating drinks.

I am directed by the Committee to inform you that in their opinion, the conduct of your wife is injurious to the harmony and interests of the club with reference to R. XII (2).

I am also directed to inform you that in the event of any further such breach of the rules by your wife, after you had an opportunity of communicating with her, the Committee acting under R. XII (4) will proceed to withdraw from her the privilege of using the club.

I am forwarding to you separately a copy of the rules of the club and I am sending to your wife a copy of this letter.

Yours faithfully,
(Signed)..................
Honorary Secretary ".

It will be seen that there are three incidents referred to-one on the 1st February, the second on the afternoon of the 8th February and the third on the evening of the 8th February. I am not concerned with the second incident as the Magistrate has quite rightly paid no attention to it, since the Committee apologised. Apart from that, on the face of it, it is clearly not defamatory. The charge against the accused differs in one respect from the actual alleged incident. It will be seen in the letter, Ex. A. incident No. 3 reads thus:—

"On the same night after the dance a servant of the club reported that your wife was with several B. O. Rs. in the reading room and she asked for them to be served with intoxicating drink."

In the charge, this incident is reproduced as follows:—

"That on the same night she was with B. O. Rs. in the reading room and asked for drinks to be served to them."

The distinction may have been inadvertently made, but it is not immaterial. The learned Magistrate was, therefore, concerned with two incidents, and the case before him was put in this manner. Issues 1 and 2 were: (1) Were the allegations defamatory *per se*? (2) If so, were they true? and (3) If not "Were the accused protected by any one or more of the exceptions to S. 499 I. P. C.?" Presuambly, the 8th and 9th exceptions were invoked. The 9th exception seems to be appropriate.

It is therefore necessary to look at the evidence. I might at this stage say that although this is a criminal revision case, I am constrained to investigate the evidence, because it appears to me that certain important aspects have been overlooked and that no proper consideration has been given to the statements of the accused themselves. This is regrettable. They are, no one doubts, honourable men who by reason of their exercising a semi-public function have found themselves hailed before a criminal court. They deserved at least as much consideration as the complainant.

(His Lordship then discussed the evidence and proceeded).

My impression of the two incidents is this. With regard to the first, that Mrs. Norris was not having a drink of any sort in the reading room on the night of February 1st, but that Mr. Lake honestly thought that she was, and from the surrounding circumstances was quite entitled to think so. With regard to the second incident on the evening of February 8th that the servants did see the Other Ranks either in the lounge or reading room or both: other ranks admittedly went into the reading room and were in the lounge for a brief time as stated by Mrs. Norris. I think the servants formed an honest opinion that the drinks were ordered for them; and here again, were justified in forming that opinion, even if it was a wrong one. With regard to this incident, it does not appear that any complaints were made to the Secretary regarding the non-serving of drinks; and it is quite certain that they were not served because of the above belief of the barman.

The question then arises, were the Committee acting honestly and with due care and attention in writing to Dr. Norris on the basis that the Secretary and servants had made true report. These matters are always questions of fact in every case. I have already indicated that they were abundantly justified in doing so with regard to the incident of the night of February 1st. As to the incident of February 8th, it seems to me that following on the incident of October 1943 and the incident—a most unfortunate incident of February 1st, 1944, there was nothing so striking about the report from a trusted servant on February 8th as to introduce the

element of negligence into the conduct of the Committee when they accepted their employee's account. Is a committee precluded from believing an old and trusted servant? Had this been a civil suit, the accused would have been in a much more favourable position. They could have given evidence on oath. The plea of privilege would have been almost irresistible as there could hardly have been any element of malice. The Magistrate has negatived malice alleged only against A1, Mr. Beckett, rightly describing the suggestion as baseless. The definition of good faith would have been that found in the General Clauses Act: "A thing shall be deemed to be done in good faith where it is done honestly whether it is done negligently or not" I have accepted that the statements contained in Ex. A are defamatory but not in the least in the manner Dr. Norris supposes. I do not attach the sinister meaning to the word "drinking" which the evidence shows, so offended Dr. Norris. Had the expression been "having a drink with" or "having drinks with" I doubt if anything would have been thought of it I cannot believe that anybody reading that letter would ever have understood anything more than that the complaint was that Mrs. Norris had broken the club rules in incident (1), by being with persons in a prohibited part of the club and in the third incident by endeavouring in breach of the rules to provide persons with alcohol, who were not permitted to consume it in the club. These are definite breaches of the club rules and such allegations may well be defamatory but not very defamatory, of the person about whom they are made. Still I do not think that the members of the Kodaikanal Club would have been very greatly shocked and distressed at hearing of this conduct on the part of one of their members as the prosecution urge. After all, what Mrs. Norris was doing, if true, was breaking the club rules in her over hospitality to Service guests.

The question, then, is entirely one of good faith. A good deal of confusion seems to have been introduced in this case by a discussion in the lower court, which was sought to be prolonged before me, based on the notion that Mrs. Norris is a member of the Kodaikanal Club. She is not a member. She is a person privileged to use the club by reason of her husband being a member. R. XII refers to the infringement of rules and the penalties therefor. At the stage when Ex. A was written it was clearly not the intention of the committee then to take disciplinary action provided by R. XII against Mrs. Norris, i.e to withdraw her privilege of using the club. That they contemplated so doing, if there was any further breach of the rules is evident from the penultimate paragraph in Ex. A. What then was the position of the Committee at the time of the writing of Ex. A? There had been according to their information, breaches of the club discipline by a person who had no more than the privilege of using the club Whether informally they might have approached her before posting Ex. A is not a matter for me to decide. It so much depends on the personalities concerned. The Committee might have been wiser in first approaching Mr. Norris informally, on the other hand, they might not. The member concerned was Dr. Norris and the committee were undoubtedly entitled to address him. They had already had trouble from one lady who having the privilege of using the club had been reprimanded or cautioned for breaking the rules. The Committee did approach her direct and were threatened with legal proceedings for their pains. After that, the Committee were perhaps a little shy of approaching the lady privileged members and so they wrote to the complainant's husband sending a copy of the letter to Mrs. Norris for her information, which I do not think can be criticised. It is, however, clear from the last sentence of clause 4 of Rule XII that had it been decided to withdraw the complainant's privilege she should, under the general law for which there is abundant authority in what are known as the Club cases, have received due notice of the inquiry and been given an opportunity to reply to the charge against her. The Committee did not decide to do that. They quite definitely decided only to issue a warning with a statement of the facts as they understood them to the member responsible, Dr. Norris. They expressly omitted the words injurious to the "character and reputation of the complainant and confined their complaint to "harmony and interests". Vide Rule XII clause 2. With regard to the actions of the Committee, it is remarkable that virtually no attention was paid, at any rate as far as can be derived from the judgment, to the written statements of the accused. It must be remembered it was their only method in these criminal proceedings of replying, especially in a Court where club servants were regarded as automatically unbelievable against the word the member. I cannot but be impressed by the earnestness of the accused's written statement, especially that of Mr. Westerdale. That they acted

honestly and in good faith in the sense that those expressions are ordinarily understood is beyond doubt. There have been a number of criticisms of their conduct after the letter was sent. Mrs. Norris complains bitterly that they would not then hear her. Here again for the reasons I have indicated above I express no opinion about this. All I am concerned with is that the libel had been published by them, and any subsequent conduct of the Committee is relevent only to the penalty. The Committee is criticised because they apologised and withdrew with regard to the second incident but withdrew only the allegations relating to incidents 1 and 3. I express no opinion about this either, especially as I hope this unhappy affair will soon be forgotten. I think it, however, right to say this that nothing that has emerged in this case seems to me in the least to affect the character of Mrs. Norris nor that of any member of the Committee. To me, the most striking feature of the whole affair is an apparent lack of proportion shown by everybody in respect of the whole story. The only importance the case has is that it shows how extremely difficult it is in a social club for a Committee faced with any form of disciplinary action against members or quasi-members to act with universal approval. It is for that reason that even if wrong Committees deserve and are given that protection (embodied in exception 9) without which it would be imposible for such a body to function. This is most especially so when a complaint has to be issued not to a member himself about his own conduct but to a member relating to the conduct of another person Honest freedom of expression must be preserved unless Committees are always to have the threat of criminal proceedings hanging over them.

Having indicated that the Committee of this Club, acted in good faith even if they were mistaken, and did not act without due care and attention, it follows that this petition must be allowed. The accused are acquitted, and the fines, if paid, will be refunded.

N.T.R. —— *Petition allowed.*

Cr. M. P. No. 255 of 1945
Cr. R. C. No. 228 of 1945
(Cr. R. P. No. 212 of 1945)
March 20, 1945

SIR LIONEL LEACH, C. J. & LAKSHMANA RAO, J.

In re Captain Hugh May Stollery Mundy Commanding Officer, Royal Naval Air Station, Tambaram*

Criminal Procedure Code (V of 1898), *S.* 549 *& Rules under—Person subject to military, naval or air force law—Trial of—Procedure.*

Where a person subject to military, naval or air force law is tried by a magistrate without acting under section 549, *Criminal Procedure Code or the rules framed thereunder. such trial is illegal and the conviction and sentence passed by the magistrate must be set aside.*

Where the Court has power to set aside an illegal conviction and sentence in revision it would be improper to deal with the matter by a writ of certiorari.

Petition praying that in the circumstances stated in the affidavit filed therewith High Court will be pleased to issue a writ of *certiorari* calling for the records in C. C. No. 259 of 1945 on the file of the Special Honorary Presidency Magistrate, George Town, Madras, and to quash the proceedings and conviction of the accused in the said C.C. No. 259 of 1945 and to direct the surrender of Eric Collins (accused) to the petitioner herein etc. and Petition under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgment of the Special Honorary Presidency Magistrate dated 6—3—1945 and passed in C. C. No. 259 of 1945.

C. R. Pattabhiraman & C. V. Nilakantan, for Petrs.

Crown Prosecutor (P. Govinda Menon), for Crown.

The Advocate-General (P. V. Rajamannar), in Crl. M.P. No. 255 of 1945.

ORDER

(SIR LIONEL LEACH, C. J.)

There are two matters before us. One is an application by the Officer Commanding the Royal Naval Air Station, Tambaram, for the issue of a writ of *certiorari* to quash the conviction of Eric Collins, an engine-room mechanic, who has been sentenced to three months rigorous imprisonment for an offence under section 304-A of the Indian Penal Code and rigorous imprisonment for one month under s. 116 of the Motor Vehicles Act. The other matter is an application by the accused for the revision of his conviction and sentence. It is quite clear that the Magistrate who investigated the charge and

* 1945 M.W.N. 262

convicted the accused did not act in accordance with law.

By reason of section 549 of the Code of Criminal Procedure the Central Government may make rules consistent with the Code and the Army Act, the Naval Discipline Act and that Act as modified by the Indian Navy (Discipline) Act and the Air Force Act and any similar law for the time being in force as to the cases in which persons subject to military, naval or air force law, shall be tried by a Court to which the Code applies, or by by court-martial. When a person is brought before a Magistrate and charged with an offence for which he is liable, to be tried either by a Court to which the Code applies, or by court-martial, the Magistrate shall have regard to the rules and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps, ship or detachment to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by court-martial.

In pursuance of the power given to the Central Government by this section, rules have been framed by the Governor-General in Council. They were notified in the Gazette of India of the 12th March 1935. Rule 1 as amended in 1936 says that where a person subject to military, naval or air force law is brought before a Magistrate and charged with an offence for which he is liable under the Army Act, the Naval Discipline Act, the Navy Discipline Act as modified by the Indian Navy (Discipline) Act, 1934, or the Air Force Act to be tried by a court-martial, the Magistrate shall not proceed to try him, or to issue orders for his case to be referred to a Bench, or to inquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such Court, unless, (a) he is of opinion for reasons to be recorded, that he should so proceed without being moved thereto by competent military, naval or air force authority, or (b) he is moved thereto by such authority. Rule 2 says that before proceeding under clause (a) of Rule 1 the Magistrate shall give notice to the commanding officer of the accused and until the expiry of a period of five days from the date of the service of the notice, he shall not (a) acquit or convict the accused under Ss. 243, 245, 247 or 248 of the Code, of Criminal Procedure or hear him in his defence under S. 224 of the Code, or (b) frame in writing a charge against the accused under S. 254 of the Code, or (c) make an order committing the accused for trial by the High Court or the Court of Session under S. 213 or sub-section (1) of S. 446 of the Code, or (d) issue orders under sub-section (1) of S. 445 of the Code for the case to be referred to a Bench. Rule 3 states that where within the period of five days mentioned in rule 2, or at any time thereafter before the Magistrate has done any act or issued any order referred to in that rule, the commanding officer of the accused gives notice to the Magistrate that, in the opinion of competent military, naval or air force authority, as the case may be, the accused should be tried by a Court-martial, the Magistrate shall stay proceedings and, if the accused is in his power or under his control, shall deliver him, with the statement prescribed by S. 549 of the Code to the authority specified in that section.

The attention of the Magistrate who tried the accused was not drawn to S. 549 of the Code of Criminal Procedure or the rules framed thereunder, and he did not act in accordance therewith. Consequently the trial was illegal and the conviction and sentence must be set aside. The Commanding Officer of the accused is the petitioner in the *certiorari* proceedings. As the Court has power to set aside the conviction and sentence in revision, it is unnecessary for us, in fact it would be improper, to deal with the matter by a writ of *certiorari*. We will deal with the matter in revision. The conviction and sentence are set aside and the Magistrate will deal with the case according to law.

N.T.R. ——

Cr. R. C. No. 311 of 1944
(Cr. R. P. No. 295 of 1944)
September 14, 1944
HAPPELL, J.

P. P. Padmanabha Iyer & another*

Food Grains Control Order, 1942—Licence under—Clause 6—If applies to wholesale sales only-Defence of India Rules, R. 81(4).

The first accused was a licensee under the Food Grains Control Order, 1942. The second accused was the son of the first accused and sold in retail a bag of rice and refused to give a receipt for the price.

Held (1) *Condition 6 of the licence issued to the accused applied to all sales, and was not confined to wholesale sales i.e., sales in any one transaction in quantities exceeding 20 maunds ; and that the refusal to give a receipt constituted an offence punishable*

* 1945 M.W.N. 263

under Rule 81 (4) *of the Def nce of India Rules.*

(2) *that the first accused was liable, because he had 'failed to secure compliance' with the conditions of the licence.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of Session of the South Malabar Division at Calicut dated 3–4–1944 in Criminal Appeal No. 28 of 1944 (C. C. No. 234 of 1948 on the file of the Court of the Joint Magistrate of Mallapuram).

K. S. Jayarama Ayyar for *K. Kuttikrishna Menon & B. Sivaraman*, for Petrs.

Assistant Public Prosecutor (N. Somasundaram), for Crown.

ORDER

The petitioners have been convicted of a breach of condition No. 6 of the licence issued to the first petitioner, who will hereinafter be called the first accused, in form A set forth in the second schedule to the Food Grains Control Order of 1942, an offence punishable under rule 81 (4) of the Defence of India Rules. The sentences passed on them were modified by the learned Sessions Judge, South Malabar on appeal and the first accused has been sentenced to pay a fine of Rs. 200 and the second accused to undergo rigorous imprisonment for two months and to pay in addition a fine of Rs. 200.

Condition No. 6 of the licence for the purchase, sale or storage for sale in wholesale quantities of food grains issued to the first accused reads as follows:

"A licensee shall, except when specially exempted by the Provincial Government in this behalf, issue to every customer a correct receipt or invoice as the case may be giving his own name, address, and licence No name, address and licence number (if any) of the customer the date of the transaction, quantity sold price per maund and the total amount charged and shall keep a duplicate of the same to be available for inspection on demand by any authorised officer of Government."

The facts as found by the Joint Magistrate of Mallapuram were these. The second accused is the son of the first and manages a mill of which the first accused is the owner. On the 13th of October 1943 the Sub-Collector of Palghat and the Deputy Tahsildar of Allattur, P. W. 1 laid a trap for the accused. P. W. 2 was sent into the mill and asked for a bag of boiled rice. For this, he was charged Rs. 27 and when he asked for a receipt, the second accused refused to give it to him. P. W. 2 then went out and informed P. W. 1 and the Sub-Collector of what had happened. He returned with P.W. 1 and the Sub-Collector and a statement was taken from the second accused in which he admitted that he had refused to grant a receipt. At the trial, the second accused explained that he had really sold to P. W. 2 two lots of boiled rice, one lot costing Rs. 15 for P. W. 2 himself and another costing Rs. 12 for his cartmen. He also said that he had told P. W. 2 that he would give him a receipt when he returned with the cartmen. This explanation was rejected, no doubt rightly, in view of the statement made by the accused and in view of the evidence of P. W. 2. The findings of fact were indeed not seriously challenged even in the appeal to the Sessions Judge, and there is no ground for coming to any different conclusion in regard to them in revision.

The price of a bag of rice at the time when the sale was made to P. W. 2 had been fixed by the Taluk Advisory Committee at Rs. 25 a bag as the wholesale rate, the retail rate being 3 edangalies per rupee, which was equivalent to Rs. 27 per bag. The retail price however, could be charged only for quantities or less than a bag. It is clear, therefore, on the facts found that the second accused did not give a receipt because he did not want it to be discovered that he was selling a bag of rice for more than the wholesale rate fixed and his explanation that, in fact, he had sold the rice in two separate quantities costing Rs. 15 and Rs. 12 each was no doubt given, as the learned joint Magistrate observes, in order that it might appear that he was entitled to charge the retail rate.

The main argument pressed on me by Mr. Jayarama Ayyar, as it was the main argument addressed to the learned Sessions Judge in appeal, is that the licence issued to the first accused applies only to wholesale sales i. e., sales in any one transaction of food grains in quantities exceeding 20 maunds so that condition No. 6 of the licence has no application to sales, as in the case of the sale to P. W. 2, of quantities of less than 20 maunds: or, in other words, the argument is that condition No. 6 can only be contravened by a refusal to give a receipt in respect of a sale of more than 20 maunds. Before considering this argument, however, it will be convenient to deal briefly with the other contentions advanced by Mr. Jayarama Ayyar on behalf of the accused. He argues that the first accused has in any case, committed no offence because he was not present when the sale was made to P.W. 2 and was not responsible for it. The answer to this argument is, as stated by the lower Court that the first accused as the licensee had

clearly, by reason of the second accused's refusal to give a receipt to P. W. 2 "failed to secure compliance" with condition No. 6 of the licence within the meaning of rule 6 of the Defence of India Rules. Then it was argued, with regard to the liability of the second accused, that as a member of the family there was nothing to prevent him from selling some of the rice retail to customers, even if his father, the first accused, had a licence to store and to sell wholesale. The learned Joint Magistrate has given a number of cogent reasons for rejecting this contention in paragraph 3 of his judgment; but, apart from any other reason that might be given, it is clearly a quite untenable contention since the rice that was sold was part of the rice stored in wholesale quantities under the licence; and it is manifest that no one, either the licensee or any one else could sell this rice except in accordance with the terms of the licence. Again it was contended on behalf of the second accused that under condition No. 6 of the licence it is only the licensee who is directed to give a receipt and that accordingly it is only the licensee who is punishable for a breach of the condition under rule 81 (4). There is no substance in this contention in view of the terms of rule 121 of the Defence of India Rules, and in the circumstances of this case it is not necessary to consider whether the necessary intention was present to complete the offence of an abetment of a contravention of the order since the second accused himself admits that he knew that a receipt should have been granted.

The contention that condition No. 6 applies only to wholesale sales like the other contentions which I have noticed, was pressed on the learned Sessions Judge and he has rejected it for reasons with which I agree. The argument is not based on the construction of the words used in condition 6 of the licence, but on general considerations which, it is said, indicate that all the conditions of the licence must apply only to wholesale transactions. These considerations are first, that the licence as stated at the top of it, is for the purchase, sale or storage for sale in wholesale quantities of food grains so that the several conditions of the licence must be taken to apply only to the sale or the storage for sale of food grains in wholesale quantities unless the contrary plainly appears from the words used; and secondly that, as a seller in retail quantities requires no licence and is not obliged to give any receipt, it cannot be believed that it was intended that a person who has a licence for storage and sale in wholesale quantities should be placed in a worse position in the matter of sales in quantities less than 20 maunds than a dealer who has no licence. This argument, I think, is merely specious. It does not follow that because a licence was given for the purchase, sale or storage for sale of food grains in wholesale quantities that every condition of the licence must apply only to wholesale sales; and with regard to the second point, the licensee by virtue of his licence is granted certain privileges and there is no reason why obligations should not be attached to the exercise of the privileges which are not imposed on those to whom no licence has been granted. Condition No. 6 should be read with condition No. 5 which provides that "the licensee shall not in any one transaction sell any of the food grains mentioned in paragraph (1) in quantities exceeding 20 maunds, to any person who does not hold a licence under the Food Grains Control Order, 1942, nor is otherwise authorised to purchase the food grains in whole sale quantities." If condition No. 6 was intended to apply only to wholesale sales, it seems clear that there would have been some reference in it to condition No. 5 either expressly or implicity; for, if Mr. Jayarama Ayyar's argument is accepted, no sales under the licence could be contemplated except sales under condition No. 5. Condition No. 6 however, as the learned Sessions Judge points out, says that a receipt shall be issued to every customer, and then later states that the receipt or invoice shall contain the licensee's own name, address and licence number and the name address and licence number (if any) of the customer. There is no need, in my opinion, to read the condition with any predilection in favour of a construction which will make it apply only to wholesale sales; and if that is so, it is clear that condition No 6 was intended to and does cover sales of any amount. The principal object of the condition seems to be to provide a check on the prices charged for food grains covered by the licence, and it is as necessary that this should be done in respect of retail as in respect of wholesale sales.

It seems to me therefore that the view taken by the learned Sessions Judge that condition No. 6 applies to all sales is correct and I have no doubt that this was perfectly well understood by the accused. The second accused refused to give the receipt in order to conceal the fact that he was selling at a

price above that fixed, and, that being so, I do not see any reason to interfere with the sentence imposed on him. The convictions of both the accused and the sentences passed on them are therefore confirmed. This petition is dismissed.

N.T.R. — *Petition dismissed.*

Criminal Revision Case No. 344 of 1944 (Criminal Revision Petition No. 328 of 1944)

September 19, 1944

HAPPEL, J.

Yanam Chinna Venkata Reddi

v.

Narvati Lingala Bugga Reddi & others*

Criminal Procedure Code (*V of* 1898) *Section* 195 (*1*) (*b*)—*Forging of sale deed for blackmail — Complaint against writer and attestors.*

In 1937 *one CVR mortgaged certain property to the complainant. In* 1940 *CVR sold the mortgaged property to the complainant. On* 6–6–1941 *a sale deed was brought into existence purporting to have been executed by the complainant by which the same property was sold to the brother of CVR. An application for the registration of this sale deed was rejected; and a suit filed to compel registration was also dismissed. Thereupon complainant filed a complaint against the writer and attestors of the sale deed, (they were not parties to the suit) for an offence under section* 467 *of the Penal Code, alleging that the object of the forgery was "to grab the properties for the benefit of themselves".*

Held, *that the allegations in the complaint did not make out an offence under section* 193, *I. P. C. and there did not seem to be any attempt to evade the provisions of section* 195 (1) (*b*) *of the Criminal Procedure Code. The object of the forgery may well have been to obtain money by using the document, by blackmail, and that therefore the statement in the complaint that the object was 'to grab' the complainant's property cannot be regarded simply as an attempt to evade the provisions of section* 195 (1)(*b*) *of the Criminal Procedure Code.*

There is no conflict between the decision in 57 *Mad.* 682 *and the decisions in* 55 *Mad.* 343 *and* 59 *Mad.* 165.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Nandyal dated 31—12—1943 and made in P. R. No. 1 of 1943.

*1945 M.W.N. 266

J. V. Srinivasa Rao, for Petitioner.

Assistant Public Prosecutor (*N. Somasundram*), the Crown.

A Gopalacharlu & P. Rama Reddi, for Respts.

ORDER.

In 1937 one Nooka Chinna Venkata Reddi mortgaged certain property to the petitioner in this Criminal Revision Case for a sum of Rs. 2500. In 1940 Chinna Venkata Reddi sold the mortgaged property to the petitioner for for Rs. 3000. On 6-6-41 a sale deed was brought into existence purporting to have been executed by the petitioner by which the same property was sold to the brother of Chinna Venkata Reddi, one Nooka Pedda Venkata Reddi for Rs. 1000. An application for the registration of this sale deed was rejected ; and a suit was then filed by Pedda Venkata Reddi in the Court of the District Munsif of Nandyal to compel registration. The suit was dismissed. The petitioner, thereupon, filed a complaint against three persons in the Court of the Stationary Sub-Magistrate, Nandyal, for an offence under section 467 of the Penal Code. These persons, who did not include Nooka Pedda Venkata Reddi and were not parties to the suit, were stated to have been the writer and the attestors of the sale deed respectively. The District Munsif, it was said, was being asked to make a complaint against Nooka Pedda Venkata Reddi. Objection was taken by the persons against whom the complaint was laid, who will hereinafter be referred to as the 1st, 2nd and 3rd accused, that the complaint was of an offence under section 193 of the Penal Code committed in the suit in the Nandyal District Munsif's Court so that under the provisions of section 195 (b) of the Criminal Procedure Code the Magistrate could not take cognizance of it except on a complaint in writing by the District Munsif of Nandyal. The Stationary Sub-Magistrate was of opinion that the question of jurisdiction could be left to be considered after the evidence had been recorded ; but, the matter having been brought in revision before this Court he was directed to decide *in limine* the question whether the complaint was barred by the provisions of S. 195, Cr. P. C. The Magistrate has now rejected the complaint on the ground that the offence 'falls primarily under S. 193 of the Penal Code' and that the Civil Court is accordingly the proper authority to institute a prosecution.

It is contended for the petitioner that the view taken by the Magistrate is wrong and

that, in the circumstances of this case there is no bar to the private complaint. The argument advanced is that the offence alleged to have been committed is an offence under s. 467 of the Penal Code as set forth at the head of the complaint, and that it is not alleged that the object of the forgery was that the forged document should be used in any stage of a judicial proceeding but that the object was "to grab the properties for the benefit of themselves". There is, therefore, no allegation of an offence under s. 193, I. P. C. nor do the facts disclose one, so that s. 195 clause (c) is applicable and not s. 195 clause (b); and against the three accused who unlike Chinna Pedda Venkata Reddi, are not parties to the suit, a complaint in writing by the Court is not necessary for the institution of criminal proceedings.

It seems not improbable that the complaint in the present case was framed with an eye on three decisions of this court: *In re Ravanappa Reddi* (1), *Tulasi Ammal* v. *Danalakshmi Ammal* (2) and *in re Appadurai Nainar* (3). The petitioner relies on the second of these cases and seeks to distinguish the other two. In *In re Ravanappa Reddi* (1) Jackson, J. observed that "the allegation is plainly stated in the complaint, and it is the allegation which attracts the mischief of s. 195 (1) (b) of the Criminal Procedure Code" and Curgenven, J., said that "the section of the Penal Code, *i.e*, Section 193 was quoted". In *In re Appadurai Nainar* (3) the decision also turned on the construction of the complaint, and the complaint stated quite clearly that the object of the forgery was "to collect" money from the complainant by using the document in a civil suit. Both cases could have been decided simply on the ground that the complaint itself alleged an offence under s 193 I. P. C. so that the provisions of s. 195 (b) of the Cr. P. C. were plainly attracted. Curgenven, J. however, in *Ravanappa Reddi* (1), with reference to the fact that conviction in the case had been for abetment of forgery of a valuable security under ss. 467 and 109 of the Penal Code, referred to an earlier decision of his own in *Perianna Muthirian* v. *Vengu Aiyar* (4) and observed in effect that it was not open to a court to permit the provisions of section 195 of the Criminal Procedure Code to be evaded by an allegation that the offence was one under section 467 when in fact, it was an offence under both sections 467 and 193 of the Penal Code. In *Appadurai Nainar in re* [3] Madhavan Nair, J. referring to these observations of Curgenven, J. said "No doubt a case of forgery may be alleged against the parties. But it has been held in this Court in *Ravanappa Reddi in re* [1] that parties should not be allowed to evade the provisions of section 195 (1) (b), Criminal Procedure Code by filing a complaint under another provision of the Penal Code if clearly an offence under S. 193 or any other section mentioned in section 195 (1) (b) has been committed". The rule as laid down by these two decisions would therefore appear to be this: that it is the allegations in the complaint which attract the mischief of section 195 (1) (b), I. P. C. subject to the qualification that evasion of the provisions of the section, such as filing a complaint alleging an offence under another provision of the Penal Code only when an offence under one of the sections mentioned in section 195 (1) (b) has been committed, will not be allowed.

The facts in *Tulasi Ammal* v. *Danalakshmi Ammal* [2] are very similar to the facts in the present case. A settlement deed was brought into existence purporting to have been executed before his death by the husband of two wives under which the second wife was a substantial beneficiary at the expense of the first wife. Registration of the deed was refused, and a suit was filed by the second wife to enforce registration. The suit was decreed, but on appeal this Court held that the deed was a forgery. Criminal proceedings were then instituted. There was never any difficulty about the position of the second wife. Even if an offence under sections 471 alone had been committed as a party to the suit the complaint against her had to be filed by the Civil Court under the provisions of section 195 (1) (c). It was, however, held that the intervention of the Court so far as the writer and attestors were concerned (they were not parties to the suit) was unnecessary. The decision was based on the finding that the case did not fall within section 193 I. P. C. as there was no reason to suppose that the primary purpose of the forgery or the document was production in Court or that it would necessarily be produced in Court at all There seems to me to be no conflict between this decision and the decisions in *In re Ravanappa Reddi* [1] and *In re Appadurai Nainar* [3] examined above, as is contended by the learned advocate for the accused. Section 195 (1) (b) will not apply because there is no reason to hold that an offence

1. (1931) M.W.N. 1314 : Cr. 274 : 55 Mad. 343
2. (1934) M.W.N. 609 : Cr. 113 : 57 Mad 682
3. (1935) M.W.N. 946(2) : Cr. 162(2): 59 Mad. 165
4. (1929) M.W.N. 196

under section 193 was committed, and there was no evasion, again because no offence mentioned in section 195 (1) (b) appeared to have been committed. In the same way, it is clear in the present case that the allegations in the complaint do not make out an offence under section 193, and there does not seem to me to be any attempt to evade the provisions of section 195 (1) (b) of the Criminal Procedure Code. In this case as in *Tulasi Ammal* v. *Danalakshmi Ammal* [2] the governing factor is relly the refusal of registration. Once registration had been refused the document was useless unless a suit to enforce registration was filed within time. But it does not follow that this position was contemplated when the document was manufactured. The object may well have been to obtain money by using the document for purposes of negotiation or, more crudely, blackmail. In my opinion, therefore, the statement in the complaint that the object was 'to grab' the petitioner's property cannot be regarded simply as an attempt to evade the provisions of section 195 (1) (b) of the Criminal Procedure Code. The facts are not distinguishable from those in *Tulasi Ammal* v *Danalakshmi Ammal* [2] and the decision in that case must be followed

The order of the Stationary Sub-Magistrate is, therefore, set aside. He is directed to restore the complaint to his file and to proceed with the hearing of the case in accordance with law.

N.T.R.

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A. A. A. O. No. 298 of 1944

November 30, 1944

HORWILL, J.

Doddeti Subbayya

v.

Mutyala Kesavalu*

Criminal Procedure Code (*V of* 1898) *S.* 253 (1) – *Discharge of one accused under—Prosecution of another accused proceeded with — Final order – Date of discharge — Limitation Act* (IX *of* 1908), *Art.* 23.

In a case brought by the appellant against the respondent and another the prosecution case was closed on the 30*th October* 1941 *and on that date the magistrate wrote on the docket of his diary 'the second accused is discharged under S.* 253 (1), *Cr. P. C.; a charge under S* 379 *Penal Code is framed against the first accused, and signed it. The first accused was committed to the sessions on the* 24*th January* 1942. *The present suit was filed on the* 25*th January* 1943.

Held, *that the suit was out of time. S.* 253 (1), *Criminal Procedure Code does not require any reasons to be stated by the magistrate for the discharge : so a mere order discharging the accused is a final order even though no reasons are given.*

Appeal against the order of the court of the subordinate judge of Ellore dated 18-3-1944 and made in A. S. No. 29 of 1944 and preferred against the decree of the court of the district munsif, Ellore, dated 26-4-1943 in O. S. No. 27 of 1943.

P. Satyanarayana Rao, for Applt.

V. Rangachari, for Respt.

JUDGMENT

The appellant brought a case under sections 379 or 411 of the Indian Penal Code against the respondent and another. The prosecution case was closed on the 30th October 1941 ; and on that date the magistrate wrote on the docket of his diary : ' The second accused is discharged under section 253 (1) of the Code of Criminal Procedure ; a charge under section 379 of the Indian Penal Code is framed against the first accused . . . . . " This was signed by the magistrate He proceeded with the enquiry against the first accused and eventually on the 24th January, 1942, committed the first accused to sessions. The present suit was filed on the 25th January, 1943, which would be the last day of limitation if the accused was discharged on the 24th January, 1942 ; but would be out of time if the accused was discharged on the 30th October 1941. The trial court held that he was discharged on the 30th October, 1941 ; because the note of the magistrate shows that he was ; whereas the appellate court considered that the matter was covered by authority and so, purporting to follow *Venkatarama Aiyar* v *Swami Nayak* [1] he allowed the appeal and remanded the suit for disposal.

The decision in *Venkatarama Aiyar* v. *Swami Nayak* [1] clearly does not cover the case that is now before me for consideration. That was a case in which the plaintiff was not an accused at all. At the time of discharging some of the accused, the magistrate expressed an opinion that the plaintiff had not participated in the offence. The magistrate however, gave no reasons until he wrote the judgment some days later. Article 23 of the Limitation Act gives the plaintiff one year from the date "when the plaintiff was acquitted or the prosecution was otherwise terminated." The prosecution could not have terminated on the date when the magis-

* 1945 M.W.N. 280

1. (1907) 17 M.L.J. 60

trate merely expressed the opinion that the plaintiff, who was not an accused at all had not committed the offence In fact, it is hard to see how Article 23 could be applied to any date in these proceedings In the present case, however, the plaintiff was an accused; and he was definitely discharged on the 30th October 1941, by an order signed by the magistrate. Section 253 (1) does not require any reasons to be stated by the magistrate for the discharge; so a mere order discharging the accused is a final order, even though no reasons are given. Where the prosecution case is closed and an accused person discharged he does not appear before the Court again; and in the subsequent proceedings against other accused he is no longer an accused. One would nevertheless expect to find in the introductory paragraphs of the final order dealing with the other accused some mention of those who had been discharged and of the reasons for discharging them. Such an incidental reference to the discharge of some accused is no indication that the discharge takes effect from the date of the final order. It may be pointed out that in the table at the head of the order only one accused person is mentioned, *viz* , the first accused.

Another case cited by the learned advocate for the respondent which approches the facts of the present case rather more closely than in *Venkataraman Aiyar* v. *Swami Nayak* (1) is *Shuppu Iyer* v. *Subramania Pattar Kariakar* (2). It was there said that some days before the judgment was delivered, the magistrate had said that some of the accused would be discharged. There was no written order, however, and there was nothing to show that the accused did not continue to appear before the magistrate until the final order was delivered. The learned Judges said :

"The Subordinate Judge has found that the 19th September was the day on which the accused were actually discharged. That is the date of the magistrate's order and the date on which in the table at the head of that order the trial is stated to have been closed. There is nothing in the record of the enquiry to indicate that the accused were discharged on the 14th; although it may be that the magistrate on that day expressed an opinion that the evidence for the prosecution was insufficient to warrant him in putting any of the accused on his trial."

It is clear that both the cases relied on by the learned advocate for the respondent can be distinguished from the case before me.

The appeal is allowed with costs in this Court and in the lower appellate Court and the judgment of the District Munsiff restored.

N.T.R. —— *Appeal allowed*

Cr. App. Nos. 648 and 826 of 1944

March 27, 1945

WADSWORTH & SHAHAB-UD-DIN, JJ.

T. S. Swaminathan & another

v.

Emperor*

Criminal Procedure Code (V of 1898), Section 197—Sanction under—Proof of.

When once the Secretary to the Government under the orders of His Excellency certifies that His Excellency has accorded sanction under section 197 of the Code of Criminal Procedure, that is a sufficient proof that His Excellency has sanctioned the prosecution in the exercise of his individual judgment as prescribed in that section in the absence of any evidence to the contrary.

Appeals against the Order of the Court of Session of the East Godavari Division at Rajahmundry in case No. 29 of the Calendar for 1944 on 2nd October 1944.

Sir Tej Bahadur Sapru, V. T. Rangaswami Ayyangar, A. Rama Rao, K. Kalyanasundaram, C. R. Pattabiraman, C. V. Nilakantan. N. Kotiswara Rao, P. Chandra Reddi, O. Chinnappa Reddi, G. Krishna & K. Venkataratnam, for Applts.

Public Prosecutor (V. L. Ethiraj) for Crown.

JUDGMENT

[Wadsworth, J.]

These appeals arise out of a case of alleged conspiracy to defraud the Government by misappropriation of magisterial fines, case properties and other funds and to falsify registers, records and accounts in order to conceal the defalcations committed in pursuance of this conspiracy. The appellant in Criminal Appeal No. 648, who will be referred to as the first appellant, is a member of the Indian Civil Service who was, during the relevant period, Sub-Collector and Joint Magistrate of Rajahmundry. The appellant in Criminal Appeal No. 826, who will be referred to as the second appellant, was his magisterial clerk. The first appellant at the time of the alleged conspiracy was an officer of more than 12 years' service drawing a pay of approximately Rs. 1600 per mensem. The second appellant was a senior clerk on a pay of Rs. 58. The period covered by the conspiracy according to the charge is from 1st January 1940 to the 17th April 1942. The first appellant was posted to Rajahmundry on 13th July 1939. About two months later

2. (1912) M.W.N. 951

*1945 M.W.N. 361 (2)

the second appellant was transferred to serve under the first appellant and he became magisterial clerk and also had charge of the suits work. On 10th October 1940 the first appellant went on leave but was re-posted to Rajahmundry when he returned on the 26th December 1940. During his absence Mr. Dass, a junior Officer of the Indian Civil Service, acted for him. It is in evidence that on the 9th October 1940 just before he went on leave the first appellant wrote to his bank asking them to transfer Rs. 2000 to the credit of his account with its head office at Madras and also to close the account after waiting for cheques already issued to be met. It is suggested that this is an indication that the first appellant did not expect to return to Rajahmundry at the end of his leave. Whether that is true or not, it is an indication that he was not apparently in any financial difficulties at the time. It is to be remarked that the total of the misappropriations for which the appellants are alleged to have been jointly responsible up to that date was under Rs. 300.

The first appellant after his return to Rajahmundry seems to have fallen out with the local Circle Inspector, Kameswara Rao Naidu The first appellant espoused the cause of one Manepalli Suryanarayana who is P.W. III. P. W. III was locked up by the police. He was released by the first appellant and after his release he filed a complaint against the Circle Inspector and the Sub-Inspector of Police. The police retaliated by making allegations against the first appellant, not only in connection with P. W. III's affair but also generally about the relations of the first appellant with the people of his division and his alleged official misdeeds The charges were so serious that Mr. Stewart, Commissioner of Land Revenue, came to Rajahmundry and held an inquiry during the months of January and February 1942. Mr. Stewart s report is not in evidence but it is common ground that the first appellant was exonerated. The Circle Inspector was transferred and he plays no further part in the present proceedings. It is alleged that the second appellant assisted the first appellant in getting the evidence ready and looking after the witnesses for Mr. Stewart's inquiry.

The first appellant was transferred to Chingleput in April 1942. He was succeeded by Mr. Wood who was himself transferred on 8th August 1942. There were thereafter several changes in the tenure of the office of the Sub Divisional Magistrate and the second appellant himself was transferred on the 18th December 1942. After his departure the then Sub-Divisional Magistrate Mr. Virabhadrayya, P. W. 125, received numerous complaints which led to the discovery of a series of embezzlements of moneys and properties received into the Court of the Joint Magistrate. He reported to the Police and his successor Mr Uthandarama Pillai, P. W. 127, investigated the matter further and laid a series of complaints before the police. The second appellant took leave and did not rejoin, sending successive applications for further leave which were refused. He was eventually arrested and convicted of absenting himself from duty and various charges of embezzlement were formulated as the facts were discovered. In the latter half of August when the second appellant was in the sub-jail the Circle Inspector, P. W. 110, interviewed him with reference to the embezzlement charges under investigation. On the 22nd August the Circle Inspector requested the Sub Divisional Magistrate to record a confessional statement from the second appellant That confessional statement is Exhibit GGG-3 which was actually recorded on the 2nd September. It is this statement which first led to the investigation of the embezzlement cases from a different angle and eventually led to the formulation of charges of conspiracy between the Joint Magistrate and the clerk to defraud the Government.

The second appellant begins his statement by saying that he wishes to make a clean breast of the whole affair in "the muddle created between" himself and the first appellant, that after being in jail for six months and having gone through the whole question very calmly he was convinced that his statement would relieve his heart. He then goes on to refer to eleven items of misappropriation, five of which were then pending enquiry before the Magistrate. With reference to these five (which include the major items in the present charges) he says that he would say nothing because they are *sub judice*. With reference to the general question of misappropriation of fines, he has a good deal to say. He begins by saying that the period of malpractice begins from January 1940 and extends to the end of November 1942 (i. e. for six months after the departure of 1st appellant). He refers to the first appellant's leave at the end of 1940 and says that he was in charge of the first appellant's incidental expenditure during his absence

and that in order to finance his expenditure he utilized a sum of Rs. 200 collected in Criminal Appeal No. 32 of 19 0 and that the first appellant never reimbursed the money though requested several times. He then refers to an amount of Rs. 75 collected as costs in M. P. No. 76 of 1939 in January 1940 and suggests that this money was kept by the first appellant and that he was unable to do anything about it. Next he refers to a payment of a fine of Rs. 75 in C. C. No. 177 of 1941 imposed on 27th March 1942 and the suggestion is that at this time there were pressing demands from jutkamen whom the second appellant had employed in connection with the defence of the first appellant in Mr. Stewart's enquiry and that the first appellant asked him to adjust this claim from the money in his hands and it is suggested that Rs. 50 paid on the spot by the accused in this case was utilized by him in that way and that the first appellant never repaid the money. Then he refers to an item of Rs. 25 which was the permanent advance of an Honorary Magistrate's Court which had been abolished and this amount he says that he forgot to hand over to his successor There is no allegation against the first appellant in this connection. Then he says:

"I had to commit deliberate acts of misappropriation between April and November 1942, and would not have done them but for the following reasons."

Then he goes on to explain how his misappropriations after the first appellant left the district were due to his experience in connection with the first appellant. He suggests that various fine amounts were retained by the first appellant though he 'might have used some of these amounts" himself and that he was unable to credit them even though he had passed receipts "by order". He dilates on the expenditure he had incurred in order to persuade witnesses who had been examined by the District Superintendent of Police to go back on their evidence in the enquiry by Mr. Stewart and he alleges that he had to finance this expenditure because the first appellant was unwilling to create evidence against himself by drawing on his own banking account. The result of this was that the second appellant borrowed and got into trouble and was compelled to misappropriate money in order to pay off his creditors. He says that he "fell into the grip of the first appellant and was gradually dragged into the mire", that he spent between Rs. 1500 and Rs. 1800 on behalf of the first appellant in Mr. Stewart's enquiry and he closes his statement by suggesting that not only the first appellant but also his successors shut their eyes to the failure of the second appellant to enter the properties in the property register apparently in order to give the second appellant an opportunity to make the matters good. Certain significant points must be mentioned in connection with this statement. It says nothing whatever about the items which have been most strongly pressed againt the first appellant as evidence of conspiracy. These items have been referred to in the arguments as the fire extinguisher money, the gold ingot and Rs. 400 currency notes in C.C. No. 23 of 1941 and the amount of Rs. 800 in currency notes in C.C. No. 168 of 1941. Though the second appellant blames the first appellant for his downfall and ascribes it to the necessity to spend money on behalf of the first appellant, he nowhere suggests that he and the first appellant agreed together in 1940 to enter upon a systematic course of fraud against the Government. However that may be, the fact remains that as a result of an elaborate investigation of a large number of instances of misappropriation accompanied by the falsification of accounts, statements and registers, charges were formulated against both the appellants the effect of which is that all these malpractices were the result of a conspiracy between the two appellants the object of which was to misappropriate the funds.

Before proceeding further it will be convenient to dispose of two legal objections which have been raised by Sir Tej Bahadur Sapru on behalf of the first appellant The first objection relates to the validity of the order sanctioning the prosecution That order is Exhibit HHH and it recites the information received regarding the commission of the various offences alleged and states:

"Now therefore, His Excellency the Governor of Madras hereby accords his sanction under sub-section (1) of s. 197 of the Code of Criminal Procedure, 1898, for the prosecution of the said T. S. Swaminathan for the said offences or abetment thereof."

It is signed by Mr. C. F. V. Williams, Secretary to Government, by order of His Excellency the Governor. The contention is that the proof of this sanction order by the proof of the signature of Mr. Williams is not sufficient evidence that sanction has been accorded by His Excellency the Governor "exercising his individual judgment", as laid down in s. 197 of the Criminal Procedure Code as

amended in the light of the provisions of ss. 52 and 27 (2) of the Government of India Act. The argument is that although the genuineness of the sanction order may have been proved by the prosecution, something more is necessary to establish that His Excellency exercised his individual judgment when according sanction. It was at first suggested that Mr. Williams who signed the order ought to have been examinnd to prove that he was present when His Excellency applied his mind to the matter and sanctioned the prosecution. But it was pointed out that no one but His Excellency himself could speak to that which passed in the mind of His Excellency. Sir Tej Bahadur Sapru thereupon went so far as to suggest that the only way in which a sanction under s. 197 of the Code of Criminal Procedure could be proved, would be to examine the Governor himself to speak to the exercise of his individual judgment.

It seems to us that this contention is ill-founded. When once the Secretary to the Government under the orders of His Excellency certifies that His Excellency has accorded sanction under section 197 of the Code of Criminal Procedure, that is in our opinion a sufficient proof that His Excellency has sanctioned the prosecution in the exercise of his individual judgment as prescribed in that section in the absence of any evidence to the contrary.

A further legal contention relates to the effect of section 162 of the Code of Criminal Procedure. Amongst the exhibits are six complaints Exhibits H, K, F, L, A and R preferred by the persons concerned with reference to fresh instances of embezzlements discovered after the special staff had commenced the investigation of the conspiracy charge. The argument put forward on behalf of the first appellant is that these so called complaints are really statements made to a police officer in the course of investigation, that they have been signed by the deponents in contravention of the provisions of section 162 and that the mere use of such signed statements invalidates the whole trial. This contention seems to us to be quite untenable. If these complaints are really statements coming under section 162, they would, of course, be quite inadmissible as evidence for the prosecution and the fact that they have been wrongly signed would not greatly increase the illegality of the use of such statements in evidence. But they are in fact nothing of the kind. They are routine complaints of new cases of embezzlement and not statements made by a witness in the course of investigation of a conspiracy charge. They are moreover of no importance in the present proceedings. We consider that their admission in evidence, merely for the purpose of showing how fresh instances of embezzlement came to be investigated, is unobjectionable.

We have to point out that the present case relates only to the alleged conspiracy and the offences committed in pursuance thereof. There is no separate charge in these proceedings against either of the appellants independently of the alleged conspiracy. Individual charges have been framed against the second appellant in the Magistrate's Court. They have been stayed pending the result of this case. This fact has to be mentioned because the second appellant has not disputed his guilt in the matter of numerous embezzlements, falsifications and forgeries. He has contented himself with trying to minimize his liability by putting the chief blame on the first appellant and has confined his appeal to the question of the sentence. It seems, therefore, clear to us that however guilty the second appellant may be of individual acts of misappropriation, falsification of accounts and forgery he cannot be convicted thereof in the present proceedings unless we are prepared to hold that these acts were committed as a result of the conspiracy between himself and the first appellant. It follows, therefore, so far as the present proceedings are concerned that if the first appellant is not proved to be guilty, the second appellant must also be acquitted and we must leave the question of his guilt on individual charges to be determined in the magisterial proceedings.

The proof of a conspiracy is always difficult and it is only rarely that it can be established by direct evidence. Apart from the statements of the second appellant, the materials to support the charges of conspiracy are entirely circumstantial and it is necessary for us to hold that the circumstances which we find to have been proved are capable of no other explanation than that which the prosecution seeks to put upon them, if the guilt of the appellant is to be established. We must be able to say that no reasonable person could from the proved facts draw any inference other than the inference that the two appellants agreed together to defraud the Government, misappropriate funds and falsify registers and accounts for the purpose of such misappropriation. There has been much cricitism of the proceedure of the learned Dis-

trict Judge in setting forth at length and relying upon items of misappropriation with which the first appellant seems to have had no connection whatever. The learned District Judge has taken the view that when once the evidence regarding the major items leads to the inference of a conspiracy, all similar misappropriations must automatically be ascribed to this conspiracy and be used to reinforce the inference that there has been a conspiracy. It seems to us that this reasoning is faulty and that unless the conspirary can be established with reference to items of misappropriation in which the first appellant can be shown to have played a part, it is futile to try and establish that conspiracy by evidence regarding items which cannot be proved to have come to his knowledge at all. The learned Public Prosecutor has agreed that the case of conspiracy stands or falls according to the view which we take with reference to a comparatively small number of items of charge in connection with which it is alleged that the first appellant is directly implicated.

Before going into the details of the major charges, it will be convenient to give a chronological summary of the progress of these embezzlements. Up to August 1940 there were no embezzlements of fine. The defalcations begin on 2nd January 1940 when the permanent advance amount of Rs. 25 remitted by the Bench Magistrate's Court which was abolished seems to have been received by the second appellant. In the same month Rs. 14 which was a case property also disappeared and at the end of the month, an amount of Rs. 75 being costs in M.C. No. 76 of 1939 is alleged to have been received by the first appellant and misappropriated, through the evidence that the first appellant handled this money is open to criticism. In April 1940 some jewels of small value disappeared. On 27th June 1940 a currency note, for Rs. 100 in C.C. No. 699 of 1940 is alleged to have been handed over to the first appellant and it is not forthcoming. In August 1940 the second appellant received Rs. 53 which was the amount of costs in an execution petition and Rs. 10 which was the fine in Criminal Appeal No. 27 of 1940. No further misappropriations are alleged until the period of approximately two months during which Mr. Dass was in charge. During these two months fines amounting to Rs. 200 in Criminal Appeal No. 32 of 1940 disappeared and there were four small items of case properties which seem to have been misappropriated. The major misappropriations begin in January 1941. On 3rd January 1941 the properties in C.C. No. 23 of 1941, namely, a gold ingot worth Rs 1200 and four Rs. 100 currency notes were handed over and there is reason to think that they were handed over either to or in the presence of the first appellant. The gold ingot was eventually returned by the second appellant after the first appellant left the district. The sum of Rs 400 in currency notes has disappeared. During the whole of 1941 we have a series of missing fines which are enumerated in the judgment of the learned Sessions Judge and were mostly paid to the first appellant. Those which were paid in his presence seem to have been entered in the fines register as having been collected. No fines whatever were remitted to the treasury from July 1941 to the end of 1942 and there were many irregularities and falsifications both in the fines register and in the monthly fines statement to cover these defalcations. In the middle of October 1941 an amount of Rs. 162, drawn under a contingent bill signed by the first appellant in payment of an account submitted by Messrs. Parry & Co. for the purchase of fire extinguishers, was misappropriased. On the 7th December 1941 while the first appellant was inspecting the Taluk Office, the second appellant received from the local Sub-Magistrate eight Rs. 100 currency notes which were the properties in C. C. No. 168 of 1941 which had been transferred from the Sub-Magistrate's Court to the Court of the Joint Magistrate. These notes undoubtedly disappeared. The evidence that the first appellant was aware of their existence has been subject to much criticism. After the close of 1941 there were two misappropriations of fines before the first appellant left the district and misappropriations seem to have continued in the time of his successors, though not perhaps on the same scale. To sum up all the major items of misappropriation appear to have taken place in the interval between the end of 1940 when the first appellant returned from leave and the beginning of 1942 when the first appellant was involved in Mr. Stewart's inquiry which is put forward by the second appellant as the main occasion for disbursements on behalf of the first appellant which led to his downfall.

The learned Public Prosecutor, who has put the case before us with conspicuous fairness and ability, has contended that the evidence regarding six main items of charge is

such as to leave no reasonable doubt that there was a conspiracy between the two appellants, the object of which was the misappropriation of public funds and the concealment of these misppropriations by falsification of registers and accounts. He lays particular emphasis on the facts that from July 1941 onwards no single fine was remitted to the treasury and that the fines register was falsified by the insertion of false challan numbers The fines statements were suppressed or falsified and there was a systematic violation of almost all the rules relating to the handling of fines, contingent moneys etc and he contends that all this could not have taken place without the active co-operation of the first appellant.

* * * * *

We do not propose to go into any further detail regarding the very numerous items of misappropriation excepting those which we have examined in detail above. It can be said of all of them that if once a conspiracy is established, it might easily be inferred that these are instances of acts in pursuance of the conspiracy, always excepting those instances which occurred in the absence of the first appellant, which seem to us to have no evidential value except to show that the second appellant was carrying out systematic misappropriations when he could not have had any assistance from the first appellant. The inference of conspiracy rests primarily on two instances, namely, the gold ingot case and the matter of the fire extinguishers. We have endeavoured to show that both these cases—extraordinary though they undoubtedly are, seem to us to indicate most unusual degree of negligence, irresponsibility and ineptitude, rather than dishonesty, so far as the first appellant is concerned It must be remembered that there is no evidence at all that the first appellant was badly in need of money. The total amount of misappropriations from which he is alleged to have profited approximates only to one month's pay of the first appellant and this spread over a period of some two years. We are asked to believe that within three months of making his acquaintance, the first appellant conspired with the second appellant who is a man of a different language with whom he had no personal affinities, to embark on a course of dishonestly which was bound to reeult in detection. That the second appellant was in need of money is established.

It seems to us most unlikely if there had been such a conspiracy that the first appellant would have taken short leave in October 1940 leaving behind him the evidence of defalcations. We cannot accept the fantastic theory that the first appellant was indulging in these highly irregular proceedings on the roadside merely for the sake of misappropriating the few rupees thereby collected. The only conclusion which we have been able to reach on a consideration of all the facts is that the first appellant is a foolish, perfunctory and negligent person quite unfitted for the office which he held, with no sense of the responsibilities laid upon him We believe that the second appellant was a cunning and unscrupulous man badly in need of money, who was quick to seize up the shortcomings of his superior and took advantage thereof to embark on a course of crime which gradually increased in its scope, as it succeeded owing to the absence of supervision by the first appellant. There is properly some truth in the evidence that the second appellant was acting as the agent of the first appellant in looking after the witnesses during Mr. Stewart's enquiry But we are not convinced that the second appellant was encouraged to finance these proceedings out of the public moneys committed to his charge. As we have already stated, we are not concerned in this trial with the individual defalcations of the second appellant. For those he will have to answer in the magisteral proceedings which are still pending. We are of opinion that the case of conspiracy, which is the only case before us, fails

In the result therefore we allow the appeals and set aside the convictions and sentences and direct the fines if paid to be refunded. The bail bond of the first appellant will be cancelled. The second appellant will be directed to give bail to the satisfaction of the Second Assistant Registrar to appear and answer the charges pending against him in the Court of the Sub Divisional Magistrate, Bhadrachalam.

N.T.R. —— *Appeal allowed.*

PRIVY COUNCIL

(Appeal from Lahore)

February 5, 1945

LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD GODDARD, SIR MADHAVAN NAIR & SIR JOHN BEAUMONT

Lala Jairam Das and others

v.

The King Emperor

Criminal Procedure Code (V of 1898)—Chapter XXXIX & Ss. 426 & 561-A—Bail—Convicted person—Special leave to appeal to Privy Council obtained—High Court—Power to grant bail.

The Code of Criminal Procedure confers no power on a High Court to grant bail in the case of a convicted person and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard.

Chapter XXXIX of the Code together with S. 426 is and was intended to contain a complete and exhaustive statement of the powers of a High Court in India to grant bail and excludes the existence of any additional inherent power in a High Court relating to the subject of bail.

S. 561-A confers no powers. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice.

D. N. Pritt K. C. & S. P. Khambatta, for Applts.

B. J. Mckenna, for Respt.

JUDGMENT.

LORD RUSSELL OF KILLOWEN: This appeal raises an important question, viz. whether a High Court in India has power to grant bail to a person who has been convicted and sentenced to imprisonment and to whom His Majesty in Council has given special leave to appeal against his conviction or sentence.

The questions which arise for consideration in such a case are of such a nature that they can only, their Lordships think, be properly dealt with by some authority in India possessing either knowledge of the relevant facts, or the means of acquiring that knowledge; but whether a High Court in India has power to grant bail in the circumstances indicated is a matter upon which diverse views have been expressed in the Courts in India, and which comes before the Board for the first time, in the following circumstances.

The appellants were convicted under section 120B read with section 420 of the Indian Penal Code, sentenced to terms of rigorous imprisonment. On appeal, the High Court of Lahore upheld the convictions but altered the sentences. The appellants, having obtained special leave from His Majesty in Council to appeal from the judgments of the High Court, applied to the High Court of Lahore to be released on bail. Their application was dismissed. From that dismissal they now appeal by special leave to His Majesty in Council. The application was dismissed upon the ground that the Judicial Committee had given no directions that an application for bail should be made to the High Court.

It will be convenient at the outset to review briefly the decisions in India.

In the year 1900 the High Court of Madras held (in a case in which special leave to appeal had been granted) that it had power to make an order for release on bail pending the decision of the appeal (see *Queen Express* v. *Subramania Ayyar* (1) On the petition for special leave, an application for bail had also been made, when the Judicial Committee stated that any such application must be dealt with by the High Court The case was argued before the High Court on the footing that the High Court could act under S. 498 of the Code of Criminal Procedure (herein referred to as the Code). The judgment simply states—"In our opinion this Court has jurisdiction to make an order in this case releasing the accused on bail pending the decision of the Privy Council"

In the year 1908 in the case of *Diwan Chand* v. *King Emperor* (2) the Chief Court, which had previously dismissed an appeal from their convictions by the accused persons, dismissed an application by them to be released on bail pending the hearing of a petition by them to His Majesty in Council for special leave to appeal. The application seems to have been based on S. 498 of the Code; but it was held that S. 498 "does not refer to a case where the Court is *functus officio*, but refers to cases where the Court has still some power left as regards the sentence of the accused" and that the Court had no power to release the accused on bail.

In February, 1923, the case of *Tulsi Telini* v. *Emperor* (3) came before the High Court of Calcutta A convicted person applied under S 498 of the Code for a stay of execution of the sentence pending the hearing of a proposed application to His Majesty in Council for special leave to appeal. It was decided that the High Court had no jurirdiction under S. 498. The Chief Justice indicated that the High Court might have had jurisdiction by reason of clause 41 of the Court's Letters Patent if the case had come within that clause, which it did not. Richardson J. distinguished the Madras case on the ground that in that case special leave to appeal had already been obtained. He was of opinion that the Court had no jurisdiction under S 498 to grant bail pending an application for special leave to appeal. The Court

1. (1900) 24 Mad. 161
2. (1908) P.R. Cr. 15 (50)
3. (1923) 50 Cal. 585

was *functus officio*, and had no seisin of the case. Nor had the Court any inherent jurisdiction. He pointed out however that it was open to the Local Government to suspend the sentence under section 401 of the Code.

On the 2nd April, 1923, the Code of Criminal Procedure (Amendment) Act 1923, came into force by which there was added to the Code section 561-A which runs thus :—

> "561-A Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

In 1926, in the case of *Emperor* v. *Ram Sarup* (4) the High Court of Allababad held that "a High Court has certainly inherent jurisdiction to stay execution of its own order when the ends of justice require it." It refused to grant bail at that stage because special leave to appeal had not yet been obtained; a petition had been lodged but had not been heard by the Judicial Committee. The applicant however was told to apply again, when leave to appeal had been granted.

In 1936 another case came before the High Court of Calcutta, viz *Babu Lal Chokhani* v. *Emperor* (5) in which it was held that after disposal of a criminal appeal the High Court is *functus officio* and has no seisin of the case, and cannot grant bail to a convicted person before leave to appeal has been granted by His Majesty in Council. The decisions in *Queen Empress* v. *Subramania Iyer* (1) and *Emperor* v. *Ram Sarup* (4) were distinguished on the ground that they were decisions given on the footing that leave to appeal had been or would be obtained The application for bail had been refused by the High Court of Calcutta, who gave their reasons at a later date. Cunliffe J. in his judgment mentions the fact that in the interval a suspension order had been made by the Local Government under section 401. Henderson J. differing from the view expressed in the Allahabad case) was of opinion that section 561-A had no reference to bail, which was a matter specifically provided for by the Code itself. It appears (from the judgment of Blacker J. in a later case) that, special leave to appeal having been subsequently obtained, a Single Bench Judge did in fact grant bail to Babu Lal Chokhani

In the same year the matter came under the consideration of the High Court of Nagpur in the case of *Bashiruddin* v. *King Emperor* (6). The High Court on an appeal from an acquittal, had convicted a person charged with an offence under s. 420 of the Indian Penal Code. He applied for bail pending an application to His Majesty in Council for leave to appeal It was held that after signing judgment convicting the accused the High Court was *functus officio* and had thereafter no power to release him on bail unless special leave to appeal was granted. The application was therefore refused "for the present because no directions had been received from their Lordships of the Privy Council. Bose J. who delivered the judgment of the Court, repudiated the idea of the High Court possessing any inherent jurisdiction to grant bail The question of bail had been expressly dealt with by the Code, "and although the matter of bail pending an appeal to the Judicial Committee in not there, its provisions on the subject must be regarded as exhaustive."

Finally in 1937 an application for bail was made to the High Court of Lahore by a convicted person who had obtained special leave to appeal from His Majesty in Council; but no direction had been given as to applying for bail to the High Court. It was decided that once the High Court had passed orders in a criminal appeal it was *functus officio* and had no seisin of the case, but that the seisin might be revived when the Judicial Committee gave leave to appeal and directed the High Court. Blacker J in delivering judgment said that he had no power to grant bail because in granting leave to appeal the Judicial Committe had given no direction to apply to the High Court for bail. He dismissed the application but stated :

> "It can in my opinion be revived if the petitioner obtains and produces any direction from their Lordships of the Privy Council in the matter which would authorize this Court to go into the question of bail"

In the present case, the appellants' application to be released on bail pending the decision of their appeal to His Maiesty in Council was dismissed by the High Court of Lahore (following the last mentioned case) on the ground that their Lordships had given no "direction to the High Court to entertain an application for bail."

From this review of the authorities in India it would appear that the various views which have prevailed may be summarised thus; (1) if leave to appeal has been obtained from His Majesty in Council and the judicial committee

4. (1926) 49 All. 247
5. (1937) I.L.R. 1 Cal. 464
6. (1937) I.LR. Nag. 236

has said that an application for bail must be dealt with by the High Court, the High Court will have power under section 498 of the Code to release a convicted person on bail pending the hearing of the appeal; (2) the High Court has an inherent power to do so if special leave to appeal has been obtained from His Majesty in Council; (3) the High Court possesses no inherent power as regards bail; (4) after disposal of a criminal appeal by the High Court it is *functus officio*, has no longer any seisin of the case, and cannot grant bail to a convicted person unless special leave to appeal has been obtained from His Majesty in Council; (5) in addition there must also be a direction received from "their Lordships of the Privy Council"; (6) the High Court's seisin of a criminal case and its power to grant bail under section 498 of the Code, is revived when the Judicial Committee gives leave to appeal and directs the High Court.

Their Lordships are unable to recognise any proceeding or conduct on their part in the past which can be properly described as a "direction to a High Court to entertain an application for bail". When any suggestion of bail has been mooted on behalf of a successful petitioner for special leave to appeal against his conviction, their Lordships have always refused to consider the matter, and have no doubt at times said that the question of bail could only be properly and satisfactorily dealt within India. But they have never given any formal direction to a High Court on the matter, nor has any reference to bail been made in Orders in Council granting leave to appeal.

Moreover their Lordships find it impossible to appreciate how any suggestion or direction by them in regard to an application for bail to the High Court, made or given when they decide to advise His Majesty that special leave to appeal from a sentence or conviction should be granted, can in any way determine or affect the question under consideration on this appeal. The High Court either does possess power to grant bail in the given circumstances or it does not. If it possesses the power it possesses it independently of any suggestion or direction made or given by their Lordships. If it does not possess it, no suggestion or direction made or given by their Lordships could confer such a power. So far as any decision in India is based upon the fact that such a suggestion was made or direction given, or that no such suggestion was made or direction given, it cannot be supported on that ground alone.

Their remains for consideration the question whether the alleged existence of a power in a High Court to grant bail in the stated circumstances can be established on other grounds. If it exists in must be either because it was conferred on the High Courts by the Code or because it is one of those inherent powers which are referred to in section 561-A of the Code.

So far as the provisions of the Code are concerned, their Lordships can discover nothing therein to justify the view that any such power is thereby conferred on a High Court. The question of bail is dealt with in Part IX of the Code ("Supplementay Provisions") under Chapter XXXIX which is entitled "Of Bail" The only granting of bail which is referred to in that chapter (which consists of sections 496 to 542 inclusive) is the granting of bail to accused persons. Their is no reference therein to the granting of bail to persons who have been tried and convicted. It is true that in the Indian decisions, section 498 seems to have been treated as though it included cases in which persons already convicted were concerned; but any such view seems to their Lordships to be a misapprehension based upon a mistaken reading of a few words which occur in that section. The section runs thus:

"498. The amont of every bound executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police-officer or Magistrate be reduced."

Two things must be observed in relation to this section. The only bonds "executed under this chapter" are executed by persons who are accused (not convicted) persons; and the words "whether there be an appeal on conviction or not" merely qualify or relate to the words "in any case," and only mean that all accused persons are within the section whether their case is appealable on conviction or not. In truth the scheme of Chapter XXXIX is that sections 496 and 497 provide for the granting of bail to accused persons before trial, and the other sections of the chapter deal with matters ancillary or subsidiary to that provision. The only provision in the Code which refers to the grant of bail to a convicted person is to be found in section 426. Section 426 forms part of Chapter XXXI of the Code which is entitled "Of Appeals" and is included in Part VII of the Code ("Of Appeal, Reference and Revision"). The section is in these terms:

426 (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or his own bond.

(2) The power confered by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(3) When the appellant is ultimately sentenced to inprisonment, penal servitude or transportation the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

A consideration of section 426 reinforces the view that section 498 has no reference to convicted persons; for if they were covered by section 498 it would confer upon the Court of Session a power to grant bail to a convicted person appealing to the High Court, a power which under section 426 is confined to the High Court. Their Lordships feel no doubt that the Code confers no power on a High Court to grant bail in the case of a convicted person, and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard.

If such a power exists in a High Court it can only be as a power inherent in a High Court, because it is a power which is necessary to secure the ends of justice. It must be observed that, as decided by Hallet, J., after a careful and exhaustive review of the authorities, that no such inherent power exists in the High Court of Justice in this country (*exparte Blyth* (7). In a case (reported only in the "Weekly Notes") Branson, J. appears to have made an order granting bail to a prisoner (in this country) who had been sentenced to 6 months imprisonment in Cyprus but had been given leave by His Majesty in Council to appeal (*Sutton* v. *Rex* (8). The order however seems to have been made with the consent of the Secretaries of State for Home Affairs and for the Colonies and cannot be relied upon as any authority for the view that a Judge of the High Court has any inherent power to grant bail in the circumstances indicated. When such power exists it is statutory.

It is perhaps conceivable that such an inherent power might exist in the High Courts in India, but historically it would seem unlikely in view of the provision found in the early Charters, which confer powers on the judges in India by reference to the powers of the Justices of the King's Bench in England in terms such as the following—"and to have such jurisdiction and authority as Our Justices of Our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England, as far as circumstances will admit". Section 561-A of the Code confers no powers. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice.

But other difficulties exist in the way of establishing that any such inherent power exists in a High Court. A power to grant bail to convicted persons would, if exercised, interrupt the serving of the sentence; the period of bail might even cover the whole of its term. A power to grant bail would not include a power to exclude the period of bail from the term of the sentence: that this is so is shown by the fact that it was necessary to enact the special provision which is contained in sub-section 3 of S. 426 of the Code. Under these conditions the exercise of a power to grant bail would, in the event of the appeal being unsuccessful, result in defeating the ends of justice. Moreover in the same event it would result in an alteration by the High Court of its judgment, which is prohibited by S. 369 of the Code. Finally their Lordships take the view that Chapter XXXIX of the Code together with S. 426 is, and was intended to contain a complete and exhaustive statement of the powers of a High Court in India to grant bail, and excludes the existence of any inherent additional power in a High Court relating to the subject of bail. They find themselves in agreement with the views expressed by Richardson J., Henderson J. and Bose J. in the three cases referred to earlier in this judgment.

It may well be that the case of an appeal from a High Court to His Majesty in Council was not within the contemplation of the framers of the Code. It may well be that a power to grant bail in such a case would be a proper and useful power to vest in a High Court. Their Lordships fully appreciate the propriety and utility of such a power, exercisable by judges acquainted with the relevant facts of each case, and (if exercised) with power to order that the bail period be excluded from the term of any sentence. But in their Lordships' opinion this desirable object can only be achieved by legislation.

7. (1941) 1 K.B. 532
8. (1932) W.N. 272

In the meantime there is a section of the Code to which, pending legislation, recourse may be had, and by means of which the ends of justice may be secured, viz. S. 401 which enables the Provincial Government to "suspend" the execution of a sentence. As herein before appears, recourse has been had to this section on previous occasions.

For the reasons indicated their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. In view of the general importance of the question which has been raised and decided their Lordships make no order as to the costs of this appeal.

PRIVY COUNCIL

(Appeal from Bombay)

May 29, 1945

LORD MACMILLAN, LORD GODDARD & SIR MADHAVAN NAIR

PARASHURAM DETARAM SHAMDASANI

v.

THE KING EMPEROR

Contempt of Court—Principles governing—Cost in such cases against Crown.

The appellant in personally appearing to argue his case said 'My fault is that I disclose everything, unlike members of the Bar, who are in the habit of not doing so and misleading the court.' The opposing counsel protested and the appellant immediately apologised. On motion for contempt of court in regard to the appellant's reference to the conduct of the Bar, he was found guilty. On appeal to the Privy Council.

Held, *that the words used by the appellant respecting the Bar did not and could not amount to a contempt of court and consequently there was no jurisdiction in the learned judge to exercise the summary powers in respect of it.*

The principle to be applied is clear enough. For words or action used in face of the court, or in the course of proceeding, for they may be used outside the court, to be a contempt, they must be such as would interfere or tend to interfere with the course of justice. No further definition can be attempted. It must be rare indeed for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an opponent, whether counsel or litigant.

This summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must necessarily possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. The Bar can surely maintain its dignity and prestige without having to invoke this jurisdiction.

Where the Crown appears to uphold a conviction in a criminal case, it is not the practice to award costs to the appellant in the event of the appeal succeeding. Although this matter is one which is known as a criminal contempt, it obviously is in a different category from an ordinary criminal case.

Where in spite of the emphatic opinion of two judges of the High Court that no contempt had been committed, the executive should have deemed it necessary to appear and to endeavour to uphold the order of contempt, when the appeal succeeds, the appellant should have the cost of the appeal.

W. W. K. Page for Applt.

J. Millard Tucker & R.B.J. Mackenna for Respt.

JUDGMENT

Lord Goddard. This is an appeal from an order of the High Court of Bombay made by Kania J. adjudging that the appellant was guilty of a contempt of court, committing him to prison for three months and ordering him to pay a fine of Rs. 1,000. On the day after the order was made the appellant applied to the learned judge for a modification of the sentence expressing sincere and unreserved regret for having used the expressions which were held to be a contempt, and the sentence was then reduced to one of eight days' imprisonment but no alteration was made in the fine. The sentence of imprisonment was served and the appellant then applied to the High Court in its appellate criminal jurisdiction for a certificate that the case was one fit for appeal to His Majesty in Council under clause 41 of the Amended Letters Patent of 1865. This application was opposed by the Advocate General, who submitted there was no jurisdiction to grant it as it was said that the clause in question did not apply to a committal for contempt of Court. The High Court (Beaumont C. J. and Sen J.) held that there was jurisdiction to grant a certificate and that it was a proper case in which to do so, and this was accepted as right by Counsel for the respondent before this Board, and their Lord-

* 1945 M. W. N. 371

ships accordingly do not think it necessary to express any opinion upon this matter.

The appellant had been an unsuccessful plaintiff in a suit in the High Court and had been ordered to pay costs. They were taxed and the appellant then took out a summons to review the taxation and, though a layman, appeared in person to support his objections. In the course of hearing Counsel opposing stated the appellant was misleading the Court as to the nature of the issues raised in the action and insisted that he should read out a paragraph in the plaint. The appellant then said: "I do not keep anything back at all. My fault is that I disclose everything, unlike members of the Bar, who are in the habit of not doing so and misleading the Court." This caused a protest from the opposing Council, Mr. Desai, whereupon the appellant immediately apologised and expressed his regret for having used an unfortunate expression in the heat of argument. Later in dealing with the Taxing Master's statement, with regard to the allowance of discretionary items, that he had taken into consideration all the matters mentioned in R. 563, the appellant said: "It is customary for the Taxing Masters to write what is written at the end of the paragraph, but is it considered at all?" No protest or observation on this statement was made either by Bench or Bar at the time when it was uttered, nor when judgment was given, and it appears to their Lordships that it must have been regarded as no more than the sort of tactless and intemperate statement that is not infrequently made in the heat of argument and not only, by litigants in person. On 13th October, 1942, the appellant concluded his argument and the Court proceeded to give judgment but had not finished doing so at the end of the day. At the rising of the Court Mr. Desai stated that he would draw the attention of the Court to the statement made by the appellant with reference to the Bar and would apply that appropriate action be taken. On the next day both Mr. Desai and the Advocate General of Bombay appeared, and, though the appellant again apologised and expressed regret for what he had said, moved the Court to punish the appellant for a contempt in using the language he did regarding the Bar. In the course of the argument the learned Judge himself then raised the question as to the words the appellant had used relating to the Taxing Masters. On the following day the learned Judge delivered a lengthy judgment, reviewing some authorities, and coming to the conclusion that the appellant had been guilty of a contempt both in his reflections on the Bar and on the Taxing Masters, made the order against which this appeal is brought.

Dealing first with the appellant's reference to the conduct of the Bar, their Lordships share the surprise expressed by the Chief Justice when granting the certificate for appeal as to what he described as the somewhat undue degree of sensitiveness displayed in taking so serious a view of what had been said. Their Lordships would indeed go further and say that it would have been more consonent with the dignity of the Bar to have ignored a foolish remark which has been made over and over again not only by the ignorant, but people who ought to know better, and no doubt will continue to be made so long as there is a profession of advocacy. To treat such words as requiring the exercise by the Court of its summary powers of punishment is not only to make a mountain out of a molehill but to give a wholly undeserved advertisement to what had far better have been treated as unworthy of either answer or even notice. But apart from the question of whether the motion was wise or expedient it has to be decided whether these words could be properly regarded as a contempt of court. The principle to the applied is clear enough. For words or action used in face of the Court, or in the course of proceedings, for they may be used outside the Court, to be a contempt, they must be such as would interfere or tend to interfere with the course of justice. No further definition can be attempted. It must be rare indeed for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an opponent, whether counsel or litigant. If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding Judge he may very properly be adjudged guilty of contempt of court, but then the offence is the disregard of the ruling and setting the Court at defiance. So also if a litigant or an advocate threatened or attempted violence on his opponent, or conceivably if he used language so outrageous and provocative as to be likely to lead to a brawl in Court, the offence could be said to have been committed. An insult to Counsel or to the opposing litigant is very different from an insult to the Court itself or to members of a jury who form part of the tribunal. Their Lordships mention this matter because their attention was drawn to

the case of *Ex parte Pater* (1), where a member of the Bar was adjudged guilty of contempt by the Middlesex Quarter Sessions and fined for insulting a juryman and persisting in his conduct when reproved by the Deputy Assistant Judge. The Court of Queen's Bench refused to interfere and would not grant a *certiorari* to quash the order saying they could not act as a Court of Appeal from the Sessions. But it is quite clear that the Court's refusal was based on the fact that there was evidence of conduct which could amount to contempt and the Court held itself free to inquire whether the inferior Court had reasonable grounds for adjudging that a contempt had been committed. Their Lordships think it unnecessary for them to deal with the cases of *R.* v. *Davision* (2) and *French* v. *French* (3) on which Kania J. relied, as the judgment of Beaumont C. J. has already shown that they do not support the propositions that the learned judge thought they did, and the Board entirely agree with the Chief Justice. In their Lordships' opinion the words used by the appellant respecting the Bar, and which must be taken to have been intended by him to refer to Mr. Desai in particular, did not and could not amount to a contempt of court, and consequently there was no jurisdiction in the learned Judge to exercise his summary powers in respect of them.

With regard to the words relating to the Taxing Masters, no doubt if a litigant were to suggest in court that its officers were corrupt or habitually failed to carry out their duties the Court might consider it a contempt, though if it were only the latter that was suggested it would be unwise to do so. But when all the circumstances here are considered, and especially that when the words were uttered there was no reproof of even comment from the Bench it is impossible to suppose that they were treated or indeed intended as more than a tactless way of suggesting that Taxing Masters were apt to deal somewhat summarily with such matters as were then in question. It was not till the Advocate General was moving for punishment on the appellant in respect of the other words that any notice seems to have been taken of the matter and then by the Judge himself, somewhat late in the day as it seems to their Lordships. In their opinion they afford no reasonable grounds for adjudging the appellant guilty of so grave an offence as contempt of court and on this point also their Lordships are glad to find that their opinion and that of the Chief Justice and Sen J. coincide.

Their Lordships would once again emphasise what has often been said before that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a Court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. The Bar can surely maintain its dignity and prestige without having to invoke this jurisdiction.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of the learned Judge set aside. It should have been said that originally the Chief Justice and other Judges of the High Court were made respondents to this appeal. It was afterwards realised that this was incorrect and by an Order in Council dated the 27th October, 1944, the Crown was substituted as rsspondent. Where the Crown appears to uphold a conviction in a criminal case it is not the practice to award costs to the appellant in the event of the appeal succeeding, Although this matter is one which is known as a criminal contempt it obviously is in a different category from an ordinary criminal case. It is a matter of some surprise to their Lordships that in spite of the emphatic opinion of the Chief Justice and another Judge of the Court of which the appellant was alleged to be in contempt that no contempt had been committed the Executive should have deemed it necessary not only to appear but to have endeavoured to uphold this order. In these circumstances their Lordships are of opinion that the appellant should have the costs of this appeal.

1. 5 B & S 299
2. 4 B & Aid 329
3. 1 Hogan 138

PRIVY COUNCIL.

(Appeal from Lahore)

January 31, 1945

LORD THANKERTON, SIR MADHAVAN NAIR & SIR JOHN BEAUMONT

Mahbub Sah*

v.

The King Emperor

Penal Code (XLV of 1860), S. 34—Proper and necessary ingredients for application—Common intention' not to be confused with 'same' or "similar' intention.

* 1945 M.W.N. 373

S. 34, I. P. C., lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intentions of all' nor does it say 'an intention common to all.' Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of S. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then libility for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, the common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is difficult, it not impossible, to procure direct evidence to prove the intention of an individul; in most cases it has to be inferred from his act or conduct or other relevant ciscumstance of the case.

Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial; and if overlooked will result in miscarriage of justice. The inference of common intention within the meaning of the term in S. 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.

Phineas Incass, for Applt.

B. Mackenna, for Respts :

JUDGMENT

Sir Madhavan Nair: This is an appeal by special leave against a judgment of the High Court of Judicature at Lahore dated 14th March 1944 confirming on appeal, the conviction of the appellant of the murder of one Allah Dad and the sentence of death passed on him by the Sessions Judge, Mianwali, on 20th December, 1943.

The appellant Mahbub Shah is aged 19. He has been convicted of murder under S. 302 read with S. 34 of the Indian Penal Code. He was also convicted of the attempted murder of one Hamidullah Khan and sentenced to seven year's rigorous imprisonment but that conviction has not been brought before the Board.

The main question raised in this appeal is whether the appellant has been rightly convicted of murder upon the true construction of S. 34 of the Indian Penal Code.

Section 34 runs at follows:—

> " When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Along with the appellant, his cousin Ghulam Quasim Shah, aged 18, was also convicted under S. 302/34 of the Indian Penal Code and sentenced to transportation for life. Ghulam was convicted under S. 307/34 also, and was sentenced to five years' rigorous imprisonment by the Sessions Judge, but his convictions and sentences have been set aside by the High Court. The deceased Allah Dad died as the result of gunshot wounds inflicted on him. One Wali Shah, who is said to have fired the shot that killed the deceased, is a fugitive from justice and has not been so far arrested. His father Mohammad Hussain Shah, who was committed to the Sessions Court on a charge of abetment of murder, was acquitted by the Sessions Judge.

The following table given in the judgment of the High Court shows the relationship between the appellant and the other persons who are alleged to have been concerned in this crime.

Mohammad Shah
- Mohammad Sharif Shah
  - Alam Shah
    - Mahbub Shah (accused)
- Mohammad Hussain Shah
  - Wali Shah (absconnder)
- Abdullah Shah
  - Ghulam Quasim Shah (accused)

The prosecution case as accepted by the High Court may be briefly stated :—On 20th August, 1943, at sunrise, Allah Dad, deceased, with a few others left their village Khanda Kel by boat for cutting reeds growing on the banks of the Indus river. When they had travelled for about a mile downstream, they saw Mohammad Shah, father of Wali Shah

(absconder) bathing on the bank of the river. On being told that they were going to collect reeds, he warned them against collecting reeds from land belonging to him. Ignoring his warning they collected about 16 bundles of reeds, and then started for the return journey While the boat was being pulled upstream by means of a rope Ghulam Quasim Shah, nephew of Mohammad Hussain Shah—acquitted by the High Court—who was standing on the bank of the river asked Allah Dad to give him the reeds that had been collected from his uncle's land. He refused. What happened subsequently was spoken to by two boys Nur Hussain P.W. 10, and Nur Mohammad P. W. 11, whose version of the story has been accepted as true by the Court and summarised as follows:—

"Quasim Shah then caught the rope and tried to snatch it away. He then pushed Allah Dad and gave a blow to Allah Dad with a small stick but it was warded off on the rope. Allah Dad then picked up the *lari* from the boat and struck Quasim Shah, Quasim Shah then shouted out for help and Wali Shah and Mahbub Shah came up. They had guns in their hands. When Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them and Wali Shah fired at Allah Dad who fell down dead and Mahbub Shah fired at Hamidullah, causing injuries to him," [Lari Is a bamboo pole for propelling the boat about ten feet long and six inches thick.]

On the above facts, the learned Judges of the High Court came to the conclusion that Ghulam Quasim was wrongly convicted of murder under s. 302/34 I.P.C. on the followin reasoning. Bhandari J., with whom Teja Sing J. concurred, first held that Ghulam Quasim had no common intention of killing any member of the complainant party when he went to the bank of the river in order to demand the bundles of reeds which had been collected from his uncles's lands. Then the learned Judge addressed himself to the question "whether a common intention" to commit the crime which was eventually committed by Mahbub Shah and Wali Shah came into being when Ghulam Quasim Shah shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns, and this he answered in the negative, holding that "so far as Qussim Shah was concerned he did no more than ask his companions to come to his assistance when he was knoked with a pole by the deceased" and that "he could not have been aware of the manner in which assistance was likely to be rendered to him or his friends were likely to shoot at and kill one man or injure another." In the result, he was acquitted of all offences.

The learned Judge then proceeded to examine the case of the appellant and Wali Shah. He stated that the case of Mahbub Shah, who was armed with a single barrelled gun, and of Wali Shah, who had a double barrelled gun, however stood on a different footing. He distinguished their case on the following ground :—

"As soon as they ran to the assistance of Ghulam Quasim Shah, they fired simultaneously in the direction of the complainants killing Allah Dad on the spot and causing injuries on the person of Hamidullah Khan. It is difficult to believe that when they fired the shots they did not have the common intention of killing one or more of the complainant party. If so, both of them are guilty of murder notwithstanding the fact that the fatal shot was fired by only one of them, namely, Wali Shah, absconder."

It will be observed that according to the learned Judge a common intention to commit the crime came into being when appellant and Wali Shah fired the shots.

Their Lordships will now proceed to consider whether the above reasoning is correct, and section 34 of the Indian Penal Code has been rightly applied to the facts of the case. Attention has already been drawn to the words of the section. As it originally stood, the section was in the following terms :—

When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each", so as to make the object of the section clear. S. 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intentions of all" nor does it say "an intention common to all." Under the section the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of S. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherence of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-

arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

On careful consideration, it appears to their Lordships that in the present case there was no evidence and there were no circumstances from which it might be inferred that the appellant must have been acting in concert with Wali Shah in pursuance of a concerted plan when he along with him rushed to the rescue of Ghulam Quasim. The exaggerated circumstances alleged by the prosecution to invoke the aid of S. 34, I.P.C. have been found against by the High Court who have acted solely on the evidence of P.W. 10 and P.W. 11. There was no evidence to indicate that Ghulam Quasim was aware that the complainant party had been cutting reeds from his uncle's lands, or that the appellant and Wali Shah had been kept behind the bush to come and help him when called upon to do so. The evidence shows that Wali Shah "happened to be out shooting game" and when he and the appellant heard Ghulam's shouts for help they came up with their guns; the former shot the deceased, killing him outright, and the appellant shot at Hamidullah Khan inflicting injuries on his person. Indeed, the High Court negatived the existence of a "common intention" at the commencement in the sense in which their Lordships have explianed the term by stating—in considering the application of S. 34, I.P.C. to the case of Ghulam—what has been already quoted, viz.; "that the sole point which requires consideration now is whether a common intention to commit the crime came into being when Ghulam shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns."

Having answered the above question in the negative as regards Ghulam Quasim, the learned Judges thought as Bhandhari, J. has expressly stated that with respect to the appellant and Wali Shah, it must be held that the common intention of killing one or more of the members of the complainant party came into being later, when they fired the shots. Their Lordships cannot agree with this view. Their Lordships are prepared to accept that the appellant and Wali Shah had the same intention, viz., the intention to rescue Quasim if need be by using the guns and that in carrying out this intention the appellant picked out Hamidullah for dealing with him and Wali Shah, the deceased, but where is the evidence of common intention to commit the criminal act complained against, in furtherance of such intention? Their Lordships find none. Evidence falls far short of showing that the appellant and Wali Shah ever entered into a premeditated concert to bring about the murder of Allah Dad in carrying out their intention of rescuing Quasim Shah. Care must be taken not to confuse same or similar intention with common intention, the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. In their Lordships' view, the inference of common intention within the meaning of the term in S. 34 should never be reached unless it is a *necessary* inference deducible from the circumstances of the case. That cannot be said about the inference sought to be deduced from the facts relied on by the High Court in distinguishing the case of the appellant from that of Ghulam Quasim.

Mr. Mac Kenna the learned Counsel for the Crown, besides supporting the judgment of the High Court on the grounds mentioned in it, called their Lordships' attention to the following additional circumstances in further support of it. Reference was made to the concluding portion of the evidence of P. Ws. 10 and 11, where it is stated that "when Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them.." and fired shots. This circumstance in stated more definitely in the evidence of P. W. 6. He stated "we then tried to run away but Mahbub Shah and Wali Shah coming in front of us and prevented our escape" and fired shots. It was argued that the attempt of the appellant and Wali Shah to prevent the escape of the complainant party shows that they were actuated by a common intention to commit the crime and from that moment the Court is entitled to infer a common intention to commit the crime even though there was no pre-concerted plan to shoot till then. This additional circumstance does not, in their Lordships' view advance the prosecution case any further, and moreover, the learned Judges of the High Court do not rely on it. In the circumstances their Lordships are not satisfied that the appellant was rightly convicted of the offence of murder under s. 302, I. P. C. read with s. 34. His conviction for murder and the sentence

of death passed on him should therefore be quashed. In this view, the further question raised in the appeal whether, in the event of his conviction being confirmed, the sentence of death passed on him should not, having regard to the circumstances of the case and his age, be commuted to one of transportation for life does not arise for consideration.

For the reasons indicated above their Lordships have humbly advised His Majesty that the appellant having succeeded in his appeal his appeal should be allowed and his conviction for murder and the sentence of death set aside.

Cr. R. C. No. 881 of 1944
(Cr. R. P. No. 826 of 1944)
March 29, 1945
HAPPELL, J.

Gnanasoundari
v.
Nallathambi alias **Jokiam Jebamalai** & others*

Penal Code (XLV of 1860) S. 494—Christian Marriage Act (XV of 1872), S. 88—Marriage between Roman Catholic and Protestant in Protestant Church—Subsequent marriage between Catholic husband with Catholic in Catholic Church—Bigamy—"Personal law" in S. 88—Custom permitting divorce.

The first accused was baptised a Roman Catholic and married the complainant, a Protestant, in 1930 in a Protestant Church. On 19-5-1942 the complainant executed a release deed in favour of the first accused, which was claimed to operate as a dissolution of the marriage according to the custom of the community. On 16-9-1943 the first accused married the second accused.

Held, (*1*) *that the release deed did not operate as a dissolution of the marriage. The custom is not a part of the personal law of the parties which invalidates the marriage* ab initio, *and there is nothing in the Divorce Act which permits the dissolution of a legal marriage between Christians by virtue of any custom applicable to either or both of the parties to the marriage;*

(2) *S. 88 of the Christian Marriage Act relates to impediments to marriage and not all the impediments enumerated in the Canon Law are necessarily attracted by the section. The marriage to attract the provisions of S. 88 must be a nullity according to the personal law of a party;*

(3) *that the marriage between the first accused and the complainant was not invalid merely because it was solemnised in a Protestant Church; that the Catholic Church does not hold a marriage between a Catholic and a Protesant solemnised in any of the ways provided by the Christian Marriage Act to be a nullity as a civil marriage by virtue of the Canon Law ; and*

(4) *that the marriage between the first accused and the complainant was a legal and valid marriage, that the first accused committed the offence defined in section* 494, *I. P. C. when he married the second accused.*

A person accused of an offence under Section 494, *I.P.C. may plead in his defence that the first marriage was null and void, even though he has not obtained a declaration to that effect under Section* 18 *of the Divorce Act.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the special First Class Magistrate of Devakottai in C. C. No. 76 of 1944.

O. T. G. Nambiar instructed by *King & Partridge* for Petr.

A. S. Sivakaminathan and *A. Dorai Raj*, for Respts.

Public Prosecutor (*V.L. Ethiraj*), for Crown

ORDER

This is a petition to revise the judgment of the Special 1st Class Magistrate, Devakottai, in Calendar Case No. 76 of 1944 by which he has acquitted the first and third accused in that case. The 1st accused was baptised a Roman Catholic and married his first wife in a Roman Catholic Church. The complainant—P.W.1—is a Protestant and in 1930 ,after the death of his first wife, the 1st accused married her in a Protestant church, the ceremony being performed by a Protestant Pastor. Two children were born of the marriage. On 19-5-42 the complainant executed a release deed—Exhibit I—in favour of the 1st accused—the relevance of this deed will appear later. On 16-9-43 the 1st accused married the second accused in a Roman Catholic Church, the ceremony being performed by the 3rd accused. a Roman Catholic Priest. Thereafter on 14—12—43 P.W. 1 filed a complaint in the Court of the Joint Magistrate of Ramnad charging the 1st and 2nd accused with the offence of bigamy punishable under section 494 of the Penal Code, and the 3rd accused with abetment of the offence.

Section 494 of the Indian Penal Code reads:

"Whoever, having a husband or wife living, marries in any caste in which such marriage is void by

* [1945] M.W.N. 421

reason of its taking place during the life of such husband or wife, shall be punished etc."

The marriage between the 1st accused and the complainant in 1930 was a marriage solemnised under the provisions of the Indian Christian Marriage Act (Act XV of 1872). S. 1 of that Act states that the Act "extends to the whole of British India" and S. 4 provides that:

"Every marriage between persons one or both of whom is (or are) a Christian or Christians, shall be solemnised in accordance with the provisions of the next following section; and any such marriage solemnised otherwise than in accordance with such provisions shall be void."

It is not disputed that the marriage between the accused and the complainant was solemnised in accordance with the provisions of S. 5 of the Act. A marriage solemnised under the provisions of the Indian Christian Marriage Act subsists so that any second marriage by either of the parties to the first marriage during the lifetime of the other party is void unless the marriage has been dissolved under the provisions of S. 10 of the Divorce Act or declared null and void under S. 18 on any of the grounds set out in S. 19. It may be conceded, however, that a person accused of an offence under S. 494, I.P.C. may plead in his defence that the first marriage was null and void even though he has not obtained a declaration to that effect under S. 10 of the Divorce Act. In the present case the 1st and the 3rd accused raised two defences. First that the marriage of the first accused to the second was not in any case void because the release deed—Exhibit I, executed by the complainant operated as a dissolution of the marriage between the 1st accused and herself according to the custom of the community to which they both belonged; and, secondly, that the marriage in 1930 was not a valid marriage by reason of the provisions of S. 88 of the Indian Christian Marriage Act. The 2nd accused was discharged on the ground that there was no proof that she knew of the 1st accused's previous marriage and her case is not before me.

The learned magistrate has not specifically found that the release deed operated as a dissolution of marriage so that the marriage between the 1st and 2nd accused was not void but he has treated it as a point in favour of the first accused. It might perhaps have been taken into consideration on a question of sentence, but it should not have been allowed to affect the question whether the 1st accused had committed the offence charged or not. The custom is not of course a part of the personal law of the parties which invalidates the marriage *ab initio* and there is nothing in the Indian Divorce Act which permits the dissolution of a legal marriage between Christians by virtue of any custom applicable to either or both of the parties to the marriage. The marriage of the 1st accused to the 2nd accused was not, therefore, a valid marriage simply by reason of the release deed executed by the complainant.

The point that has now been reached that if the marriage between the 1st and the 2nd accused is not void it can only be because the earlier marriage between the 1st accused and the complainant was not a valid marriage by reason of the provision of section 88 of the Indian Christian Marriage Act. Section 88 of the Act reads:

"Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into."

It is contended for the accused that the personal law of the 1st accused who was baptised a Roman Catholic if the Canon Law of the Church of Rome and that the Canon Law forbids the marriage of a Roman Catholic with a Protestant without a dispensation and forbids absolutely the marriage of a Catholic with a Protestant in a Protestant Church by a Protestant Pastor. For the complainant it is argued that "personal law" in S. 88 does not mean the whole of the personal Law of the party or parties applicable to marriage but only such parts of the personal law as prohibit any marriage between the parties. The personal law contemplated, it is said, if S. 88 is construed in its proper context and having regard to the Act as a whole is that part of the personal law which relates to impediments which prohibit the marriage of the parties absolutely, such impediments as that given as the marginal note to S. 88 that the parties are "within prohibited degree of consanguinity" or impediments of a like absolute character such as idiocy, impotence, or infancy. In support of his argument learned counsel for the complainant relies on the decision of the Bombay High Court in *Saldhana* v. *Saldhana* [1]. The contention put forward for the accused is supported mainly on the ground that, according to the ordinary rules of construction, "the personal law applicable to either of the parties" will not bear the restricted meaning put on the words by the complainant.

Before considering *Saldhana* v. *Saldhana* [1], it will be convenient to refer to an earlier decision of the Calcutta High Court *Lopez* v. *Lopez* [2]. In *Lopez* v. *Lopez* [2] it was plead-

1. (1930) I.L.R. 54 Bom. 288
2. (1886) I.L.R. 12 Cal. 706

ed by the defendant in a suit for restitution of conjugal rights that his marriage to the plaintiff was null and void as she was his deceased wife's sister. The case turned on whether the English law with regard to prohibited degrees applied or the personal law of the defendant who was a Roman Catholic. If the English law, as it then stood, applied, the marriage was null and void; but under the personal law of the defendant, which was held to be Canon Law, a valid marriage could be contracted if a dispensation had been granted. It was held that the defendant's personal law applied and, in the absence of evidence, the dispensation was presumed. The case is not precisely in point. What was decided was, first, that the personal law of the party with regard to prohibited degrees was the personal law of the community to which the party belonged and not the personal law of English Christians on the footing that the personal law of English Christians had become the personal law of all Christians domiciled in India; and, secondly, that the personal law of a Roman Catholic governing religious matters is the Canon Law. The question, however, of the scope of s. 88 was not considered. The case decided no more than that a marriage solemnised under the Indian Christian Marriage Act is invalid if the relationship of the parties to it is within the prohibited degrees according to the personal law of either of the parties.

Saldhana v. *Saldhana* (1) is more directly in point. In that case two Roman Catholics were married in due form under the Christian Marriage Act before a Registrar in accordance with the provisions of Part V of the Act. Shortly afterwards, the husband was married again to another woman in a Catholic Church by a Catholic priest. The wife of the first marriage brought a suit for a declaration of the validity of her first marriage and for restitution of conjugal rights and at the same time the husband was prosecuted for bigamy. The suit was decreed for the plaintiff but in the criminal case the husband was acquitted. The defendants appealed against the decree in the civil suit and the Provincial Government appealed against the acquittal of the husband in the criminal case. Both appeals were heard by a Bench of the Bombay High Court which consisted of Blackwell and Kemp Justices. The argument advanced for the husband was that he was governed by the Canon Law which forbade Roman Catholics to marry otherwise than "*In facie ecclesiae*" so that his first marriage was invalid under the provisions of s. 88 of the Indian Christian Marriage Act. The learned Judges agreed in dismissing the civil appeal and in allowing the appeal of the Government against the acquittal of the husband. Blackwell, J. held that Section 88 did not cover any prohibition as to the form of marriage, and drew attention in regard to the law of marriage to the distinction between the *lex loci contractus* and the *lex domicilii*. He pointed out that it was impossible to suppose that the legislature in an Act dealing with the forms of marriage of Christians could by section 88 have intended to enable parties to rely upon a prohibition as to form imposed by their personal law so as to invalidate the marriage. He concluded that the expressions "personal law" in section 88 is not limited to the personal law as to prohibited degrees but would include any personal law apart from any personal law as to the form of marriage, which forbade either of the parties to enter into a contract of marriage with one another. Kemp J. considered that the Canon Law did not in fact prohibit the marriage. He also expressed the opinion that although the personal law referred to in S. 88 of the Indian Christian Marriage Act is to be found, as far as Catholics are concerned, in the Canon Law, *Lopez* v. *Lopez* (2) was no authority for the proposition that the expression "personal law" incorporates the whole of that personal law.

Except for the fact that it is not in every respect on all fours with the present case I should be content to follow *Saldhana* v. *Saldhana* (1) and say no more. In *Saldhana* v. *Saldhana* (1) however, both parties were Catholics and the marriage was before a Registrar; in the present case one of the parties was baptised a Catholic while the other was a Protestant and the marriage was solemnised in a Protestant Church. In *Saldhana* v. *Saldhana* (1) therefore, the objection to the marriage in the eyes of the Church or according to the Canon Law could be nothing more than an objection to the form of the marriage. As Kemp J. pointed out prior to the marriage before the Registrar there was nothing in the personal law of the parties which forbade their marriage. In the present case there is not only the question of the form of the marriage in a Protestant Church and so not *in facie ecclesiae*, but the marriage was between the Catholic and a Protestant which is forbidden by the Canon Law without a dispensation. *Saldhana* v. *Saldhana* (1) covers the facts of the present case to this extent, that the marriage between the first accused and the complainant is not invalid merely because it was solemnised in a Protestant

Church. The question remains whether a marriage between a Catholic and a Protestant without a dispensation is void according to the personal law applicable to Catholics so that, under the provisions of S. 88, it cannot be validated by anything in the Indian Christian Marriage Act. Although in *Saldhana* v. *Saldhana* (1) only the form of the marriage was in question, the view expressed by Kemp, J. with which I respectfully agree that S. 88 relates to impediments to marriage and that not all the impediments enumerated in the Canon Law are necessarily attracted by the section, affords guidance for the construction of the section as a whole. The words "Nothing in this Act shall be deemed to validate any marriage" presuppose that the marriage is not merely forbidden by the personal law of a party but that it is, according to that personal law, a nullity. Is then the impediment under the Canon Law to the marriage of a Catholic and a Protestant without a dispensation an impediment covered by the expression "Personal Law" in section 88, and does the impediment, according to the Canon Law, render a marriage between a Catholic and a Protestant no marriage at all?

A Christian or Christians can only contract a legal marriage in India under the provisions of the Indian Christian Marriage Act. All the provisions of the Act apply to Christians of all denominations except Part VI, which deals with the marriage of Native Christians, and which it is stated "shall not apply to marriages between Roman Catholics" except "so much of sections 62 and 63 as are referred to in section 64". Section 88 is the last section of the Act and appears in Part VIII which is headed "Miscellaneous". Now it would certainly be surprising, having regard to the scheme of the Act and the position of section 88 in it, if the provisions of section 88 should make it impossible for a Catholic and a Protestant to marry at all except in accordance with the provisions of the Canon Law. This cannot have been contemplated by the legislature, and the difficulty is obviated if an interpretation is put on the section which in my opinion, does no violence to the words used, namely, that as the marriage to attract the provisions of S. 88 must be a unllity according to the personal law of a party, that part of the personal law of the parties only is contemplated by the section which relates to absolute impediments to any marriage at all between the parties even marriage according to the rites of their own churches, impediments such as prohibited degrees of consanguinity or affinity.

That this view is correct appears, in my opinion, from a consideration of the question from the point of view of whether the Canon Law does in fact forbid a Catholic and a Protestant to enter into a marriage on a proper construction of these words in their context in s. 88 of the Act. The marriage which under s. 88 will be invalidated if the personal law applicable to either of the parties forbade them to enter into it is a marriage which, but for the personal law of the parties, is a legal and valid marriage according to the law of India. For such a marriage to be deemed not to be valid, however the scope of s. 88 is regarded, it is clear that the personal law of a party must not only forbid the party to enter into the marriage but must hold such a marriage not to be a legal marriage but to be null and void *ab initio*. But does the Canon Law forbid a Roman Catholic to enter into a marriage with a Protestant except after a dispensation has been granted and in a Catholic Church in this sense? I do not think that it does and certainly it was not proved in this case that it does. Father Kalathil Professor of Theology in the St. Paul's Seminary at Trichinopoly gave evidence for the defence as D. W. 9. He referred in his examination in chief to Canons 1094, 1060, 1061, 1325, 1090 and other canons and stated no doubt that a Catholic and a Protestant could not enter into a valid marriage except under a dispensation from the Church got under Canon 1061. But it is clear that what he meant was that they could not enter into a valid marriage in the eyes of the Church. In his cross-examination he said that he was not informed about any prior marriage of the first accused; and then, and this shows clearly that he was not contending for the position that the first accused was at liberty to marry another woman because the earlier marriage was forbidden by the Canon Law " The Civil Powers are competent to legislate as regards the effects of matrimony ". A marriage, as has already been pointed out, must be a nullity according to the personal law of either of the parties to it before any question of its being validated by reason of anything contained in the Christian Marriage Act can arise; and, for the reasons given, I do not think that the Catholic Church holds a marriage between a Catholic and Protestant solemnised in any of the ways provided by the Indian Christian Marriage Act to be a nullity as a Civil Marriage by virtue of the Canon Law, and I am quite clear that it has not been proved that the Catholic Church holds such a marriage to be a nullity. This supports the conclusion,

reached by other means that the expression "personal law" in S 88 means the personal law of either party which relates to absolute impediments to any marriage between the parties. All that was intended to be done or was done, as is pointed out in *Lopez* v. *Lopez* [2], by the changes introduced by the Indian Divorce Act of 1869 and the Indian Christian Marriage Act of 1872 taken with S. 88 of the latter Act was to provide that the law applicable to such absolute prohibition of any marriage between parties as prohibited degrees of consanguinity or affinity was not the personal law of Christians in England but personal law applicable to either of the parties. S. 88 of the Indian Christian Marriage Act in my judgment has no wider scope.

It follows from what has been said above that the marriage between 1st accused and the complainant was a legal and valid marriage, that it was subsisting when the 1st accused married the 2nd accused, and that the marriage of the 1st accused with the 2nd accused was void by reason of its taking place during the life of the complainant. This being so, the 1st accused committed the offence defined in S. 494 of the Penal Code, and the judgment of the special 1st Class Magistrate of Devakottai acquitting him was wrong. With regard to the third accused his acquittal necessarily followed on the finding of the magistrate that the first accused had not committed bigamy; but the magistrate also found that there was no proof that he knew that the complainant was alive when the marriage of the 1st accused with the 2nd was performed. In view of his defence to the charge and the written statements filed by him it may seem that it would not have affected his conduct even if he had known that P.W. 1 was alive. On the findings of fact however, he was in any event entitled to be acquitted of the offence of abetment of bigamy, and, as I am sitting in revision, I am not disposed to interfere. It does not affect the case against the 3rd accused but I may perhaps observe that it seems not improbable that the marriage of the 1st accused with the second was in fact permitted and performed because of the custom in the community to which the 1st accused belonged, in respect of which there was evidence, to regard a release deed such as Exhibit I as constituting a valid dissolution of the marriage between the parties. The extreme claim made that the marriage between the first accused and the complainant was invalid even as a civil marriage according to the Canon Law was possibly an afterthought.

With regard to the first accused I am quite clear, for the reasons given above, that he should have been convicted of an offence under S. 494 of the Indian Penal Code and that the order of the first class Magistrate of Devakottai acquitting him was wrong. In the exercise of my revisional jurisdiction, however, I cannot myself convict the accused. I can only order a retrial. The principle involved in this case is important, but I do not think that it is necessary to take a serious view of the offence committed by the first accused. He seems to have thought that he was entitled to marry again because of the release deed according to the custom of his caste, and it also seems to have been the opinion of his spiritual adviser that he was entitled to marry again. In these circumstances it does not seem to me necessary or desirable that the first accused should be put on his trial again, and I understand that a retrial of the case is not desired by the petitioner. All that is desired is that the principle should be established that in the circumstances of this case the offence of bigamy was committed. If, however, a retrial is not directed, the only alternative is to dismiss the petition.

The petition is therefore dismissed, but I would make it clear that it is dismissed only for the reason that in the special circumstances of this case a retrial is neither necessary nor desirable.

N.T.R. —— *Petition dismissed.*

Cr. R.C No. 180 of 1945
(Cr. R. P. No. 169 of 1945)
April 20, 1945
HAPPELL, J.

Eswaradoss Kalidoss In re*

Criminal Procedure Code (V of 1898), Ss. 195 (1) (*b*) & 476—*False complaint to police—Charge sheet—Discharge of accused —Prosecution of complainant under S.* 211, *I P.C.—Complaint.*

Petitioner presented a complaint to the police against one B, complaining of an offence under S. 406, *I. P C. The police filed a charge sheet on the basis of this complaint in the Court of the Chief Presidency Magistrate and the case resulted in the discharge of B. Then the police filed a complaint against the petitioner for an offence under S.* 211 *of the Penal Code. This complaint was transferred to the file of the Third Presidency Magistrate.*

Held, *that the offence alleged to have been committed by virtue of the complaint to the*

*1945 M.W.N. 425

police was committed in relation to the proceedings in the Court of the Chief Presidency Magistrate, and that therefore the Third Presidency Magistrate had no jurisdiction to take cognisance of the case against the petitioner without a complaint from the Chief Presidency Magistrate.

A.I.R. 1927 *Cal.* 478, followed.

I.L.R. 51 *All.* 382, distinguished.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the order of the Third Presidency Magistrate of the Court of the Presidency Magistrates Egmore, Madras, dated 2-2-1945 and made in C. C. 2945 of 1944.

A. Bhujanga Rao, for Petr.

Crown Prosecutor (*P. Govinda Menon*), for Crown.

ORDER

The petitioner presented a complaint to the Assistant Commissioner of Police, Crime, Madras, against a certain R. V. Bhat alleging that he had committed an offence under S. 406 of the Penal Code in respect of a number of diamonds, valued at Rs. 20,000, entrusted to him by the petitioner. The police filed a charge sheet on the basis of this complaint in the Court of the Chief Presidency Magistrate, and the case resulted in the discharge of the accused. In the course of the enquiry the petitioner gave evidence which, in the opinion of the prosecution, was irreconcilable with certain of the statements made in the complaint; and the Assistant Commissioner thereupon, filed a complaint against him for an offence under S. 211 of the Penal Code. This complaint was transferred to the file of the Third Presidency Magistrate, and the preliminary objection was raised that the Third Presidency Magistrate had no jurisdiction to try the case without a complaint from the Chief Presidency Magistrate in accordance with the provisions of S. 195 (1) (b) read with S. 476 of the Criminal Procedure Code. This objection was overruled by the Third Presidency Magistrate, and the petition now under consideration is againt his order.

Section 195 (1) (b) of the Criminal Procedure Code enacts that

"No Court shall take cognizance of any offence punishable under any of the following sections of the Indian Penal Code, namely, sections (here a number of sections are enumerated of which S. 211 is one) when such offence is alleged to have been committed in or in relation to any proceeding in any Court, except on the complaint in writing of such court or of some other Court to which such Court is subordinate."

The offence alleged in the present case was not of course committed in the proceeding in the Chief Presidency Magistrate's Court which resulted in the discharge of R.V. Bhat. The question for determination is whether the offence constituted by the alleged false complaint should be regarded as an offence committed in relation to the proceedings in the Chief Presidency Magistrate's Court.

Neither the learned Public Prosecutor nor learned Counsel for the petitioner has been able to refer me to any decision of this Court which is directly in point. Learned Counsel for the petitioner relies on a decision of the Calcutta HighCourt in *Ahmed* v. *Emperor* (1). In that case a complaint of theft to the police was prosecuted by them and resulted in a trial in a Sessions Court. The accused was acquitted and the Sessions Judge holding that the charge was false, made a complaint under s. 476 of the Criminal Procedure Code of an offence under s. 211 of the Penal Code. The learned Judges of the Calcutta High Court held that the false charge to the police, even though the offence was committed before the proceedings began in the Sessions Court, must be regarded as a matter relating to the proceedings in the Sessions Court since it was the basis of those proceedings. *Ahmed* v. *Emperor* (1), is not distinguishable from the present case. My attention, however, has been drawn to the case of *Emperor* v. *Prag Datt* (2) decided by Dalal, J. in which it is said a different view is taken. This is not quite correct. In *Emperor* v. *Prag Datt* (2) there had been a complaint to the police which resulted in no proceedings, and then a complaint by the same person on the same facts to a Magistrate. Dalal J. held that a Magistrate could take cognizance of a complaint by the police in respect of the complaint to them. It may be doubted whether this view could be taken in Madras; but it is unnecessary to decide the question as the fact that there were two complaints and that the complaint to the police did not directly result in proceedings in any court clearly distinguishes *Emperor* v. *Prag Datt* (2) from the present case.

As already stated there seems to be no decision of this Court which is directly in point; but the view expressed by the learned Judges of the Calcutta High Court in *Ahmed* v. *Emperor* (1), is, in my opinion, in accordance with the judgment of a Full Bench of this

1. (1927) A.I.R. Cal. 478
2. (1929) I.L.R. 51 All. 382

Court in *Registrar, High Court, Madras* v. *Kodanki* (3). The question referred to the Full Bench in that case was:

"When a charge is made by a complainant to the police against more than one individual and the police while charging before the Court one or more of such individuals of the offence complained of, do not charge them all, is a complaint of the Court under S. 476 of the Code of Criminal Procedure necessary to prosecute the complainant under S. 211 I. P. C., in respect of the person or persons whom the police have not charged before the Court."

The answer given by the Full Bench was that the Court had no jurisdiction to take action under s. 476 against the complainant in respect of the individuals not charged. The question referred does not of course cover the present case; but it seems to the clear that the underlying assumption in the order of reference and in the judgment of the Full Bench is that there would have been no difficulty if the question had been of the prosecution of the complainant in respect of the person charged. In that case the answer would have been that a complaint by the Court was necessary. Wallace, J. indeed observed in delivering the judgment of the Full Bench that "In a case under s. 211, Indian Penal Code, when the police or the complainant or any one else brings the charge which is the subject matter of the offence, to trial in a Court, then it may be fairly contended that the offence has been committed in relation to a proceeding in the Court". I have, therefore no hesitation in following the decision in *Ahmed* v *Emperor* (1) In my opinion the offence alleged to have been committed by virtue of the complaint to the Assistant Commissioner of Police, Crime was committed in relation to the proceedings in C.C. No. 2382 of 1944 in the Court of the Chief Presidency Magistrate and, that being so, the Third Presidency Magistrate, had no jurisdiction to take cognizance of the case against the complainant without a complaint from the Chief Presidency Magistrate. The petition is accordingly allowed, and the proceedings in C. C No. 2945 of 1944 on the file of the Third Presidency Magistrate are quashed.

N. T. R. —— *Petition Allowed.*

3. (1930) M.W.N. 1130, Cr. 258; 55 Mad. 611 F.B.

Cr. R. C. No. 178 of 1945
(Cr. R. P. No. 167 of 1945)
March 29, 1945
HAPPELL, J.

Kandimalla Thirupelu and others In re*

Criminal Procedure Code (V of 1898), Ss. 190 436 & 437 – Sessions Judge, if can direct Magistrate to take cognizance of an offence

There is no provision of law which enables a Sessions Judge either to take cognizance of an offence himself or to direct a Magistrate to take cognizance of an offence. A Sessions Court is not a Court of first instance.

Petitions under Sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the Court of Session of the Cuddapah division dated 8-2-1945 and passed in Sessions Case No. 61 of 1944 (P. R. C. 3 of the 1944 Taluk 2nd Class Magistrate's Court, Pulivandla)

V. T. Rangaswami Ayyangar & P. Rami Reddy, for Petrs.

Public Prosecutor (*V. L. Ethiraj*), for Crown.

ORDER

The order of the learned Sessions Judge directing the Taluk Second Class Magistrate of Pulivendla to hold a further inquiry and consider whether there are, or are not, grounds for inquiring into a charge against the accused of a more serious character than the charge in respect of which they were committed cannot be supported. The Sessions Judge made the order because in the course of the examination of P. W. 1 it appeared that in connection with the transaction in which P. W. 1 was himself injured a certain Sultan had been killed. No charge sheet, however, was framed in connection with the death of Sultan and the accused were not committed on any charge connected with his death. Under S. 436 of the Code of Criminal Procedure a Session Judge may direct further inquiry into the case of a person who has been discharged; and under S. 437 he can order the commitment of a person who has been discharged instead of directing a fresh inquiry. There appears, however, to be no provision of law which enables a Sessions Judge either to take cognizance of an offence himself or to direct a Magistrate to take cognizance of an offence. A Sessions Court is not a Court of first instance. In the present case, the murdre, if it was a murder, of Sultan would constitute a separate offence from the attempted murder of P.W. 1; and the order of the Sessions Judge in effect directs the Magis-

*1945 M.W.N. 427

trate to take cognizance of the offence. The Magistrate himself no doubt in the course of the inquiry could have taken cognizance of the offence upon his own knowledge or suspicion under S. 190 (c) of the Code of Criminal Procedure and, having taken cognizance, if he was satisfied that a *prima facie* case had been made out on the evidence, he could have committed the accused. He did not, however, do this. The petition is allowed and the order of the Sessions Judge under reference is set aside. He will now proceed to try the accused in the Sessions case committed to him.

N.T.R —

Cr. R C. No. 744 of 1944
(Cr. R.P. No. 702 of 1944)
November 24, 1944
HAPPELL, J.

Sinna Ranga Boyan & others In re*

*Criminal Procedure Code (V of 1898), S. 403 (1)—Conviction under Ss. 147 and 148 I. P. C.—Acquittal on appeal and remand for trial under Ss. 323 and 324—*Autrefois acquit.

The petitioners were convicted for offences under Ss. 147 and 148 I.P.C. On appeal the sessions judge set aside the convictions and remanded the case for disposal, since he thought that the evidence showed that offences under Ss. 323 and 324, I. P. C., in respect of which no charges were framed, had been committed.

Held, *that the effect of the remand was that the petitioners would be tried again for the same offence within the meaning of S. 403 (1) of the Code of Criminal Procedure and that therefore the remand was without jurisdiction.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of Coimbatore Division passed in C. A. No. 114 of 1944 dated 28-7-44 (C. C. No. 35 of 1944. Additional 1st Class Magistrate, Erode.)

V. T. Rangaswami Ayyangar, K Kalyanasundaram Iyer & A. N. Rangaswami, for Petrs.

Assistant Public Prosecutor (*A. S. Sivakaminathan*), for Crown.

ORDER

The petitioners were convicted by the trial Court for offences under ss. 147 and 148 of the Indian Penal Code. On appeal to the Sessions Judge of Coimbatore, the convictions for the offences under Ss. 147 and 148 of the Indian Penal Code were set aside because, in the opinion of the Sessions Judge, there was no proof that any more than three persons took part in beating the complainant. The Sessions Judge, although he set aside the the convictions, remanded the case for fresh disposal, since he thought that the evidence showed that offences under sections 323 and and 324 I. P. C. in respect of which no charges were framed had been committed. In my judgment the learned Sessions Judge had no jurisdiction to remand the case for fresh disposal. If the petitioners are now to be tried for offences under ss. 323 and 324 of the Indian Penal Code, they would be being tried on the same facts as the facts which formed the subject matter of the case under ss. 147 and 148 I. P. C. and in respect of offences for which charges might have been framed in the case in which they have been acquitted. They will in fact be being tried again for the same offence within the meaning of s. 403 (1) of the Code of Criminal Procedure.

The order of the Sessions Judge directing remand of the case for fresh disposal is therefore set aside. The acquittal of the accused is confirmed and their bail bonds will be cancelled.

N. T. R. —

FEDERAL COURT
(On Appeal from Calcutta)
Cr. App. No. 16 of 1944
January 19, 1945
SIR PATRICK SPENS, C.J., SIR S. VARADACHARIAR & SIR MD. ZAFRULLA KHAN, JJ.

Basdeo Agarwala
v.
Emperor

Drugs Control Order (1943) Cl. 16—Sanction under by Provincial Government—Prosecution instituted prior to sanction—Effect—Form of sanction.

The words of Cl. 16 of the Drugs Control Order are plain and imperative and it is essential that its provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, they should be regarded as completely null and void and if sanction is subsequently given new proceedings should be commenced ab initio.

Where special statutory powers are conferred and specific provision is made in the statute as to the manner in which the powers are to be exercised they should be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions there of.

*1945 M.W.N. 428 (1)

*1945 M W N 428 (2)

Mahabir Prasad, *Samarendra Nath Mukherjee* & *R.J. Bahadur* instructed by *N.R. Bose*, for Appl.

Sir Brojendra Mitter & *H. K. Bose* instructed by *B. Banerji* for Respt.

JUDGMENT

(SIR PATRICK SPNES, C. J.)

The appellant to this case was charged with two offences alleged to have been committed on the 20th of April 1944, contravening the provisions of clauses 9 (a) and 13 (d) of the Drugs Control Order, 1943. He was convicted on the 29th June 1944, and sentenced to a term of four month rigorous imprisonment and a fine of Rs. 1,000 or in default to a further term of four months' rigorous imprisonment. Against this conviction he appealed to the High Court of Judicature at Fort William in Bengal, and on the 13th November, 1944, his appeal was dismissed, although the sentence of imprisonment was reduced from four months to one month. A certificate under section 205 of the Government of India Act, 1935, was granted and hence the appeal to this Court.

The Drugs Control Order 1943 provides by clause 16 as follows:

"No prosecution for any contravention of the provisions of this order shall be instituted without the previous sanction of the Provincial Government....

In purported compliance with the provisions of clause 16, the Provincial Government of Bengal made an order sanctioning the prosecution of the appellant by a document dated the 23rd May, 1944, in the following terms:

"Whereas it appears from a report of the Deputy Commissioner of Police, Enforcement Department Calcutta that............Basudev Agarwalla, son of Anandaram Agarwalla.... of 185 Harrison Road, Calcutta C/o. Messrs. Umashankar & Co., Ltd., sold on 20th April, 1944. 6 x 1 cc. ampules of Emetine Hydrochloride containing 1 gr. each to Babu H N. Roy, Sub-Inspector of Excise, employed on drugs control work for Rs. 13 in contravention of clause 9 of the Drugs Control Order, 1943, the Provincial Government. in exercise of the power conferred by clause 16 of the said order sanction the prosecution of the aforesaid .. . Basudev Agarwalla under sub-rule (A) of rule 81 of the Defence of India Rules.

(Sd.) S. BANNERJEE,
Secretary to Govt. of Bengal.

It was argued before us that the sanction in the above form did not comply with the provisions of sections 49 and 59 of the Government of India Act, 1935. It was suggested that under those sections the sanction must be expressed to be given by the Governor and that it was improper that the Provincial Government should have purported to sanction the prosecution. This argument was apparently based on what were assumed to have been the views of the majority of this Court in *Sibnath Banerjee's case* [1]. But as pointed out in that case where special statutory powers are conferred and specific provision is made in the statutes as to the manner in which the powers are to be exercised, they should be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions thereof. In this case the provisions of clause 16 expressly authorise the previous sanction of the Provincial Government and accordingly in our judgment no valid objection can be taken to the form of the sanction purported to be given in this case.

It was then argued that on the facts of this case the prosecution had been instituted prior to the giving of the sanction in question and that accordingly having regard to the very definite provisions of clause 16, the proceedings and conviction must be null and void.

From the Order Sheet of the Chief Presidency Magistrate's Record it appears that the appellant was produced before the Chief Presidency Magistrate on the 2nd May, 1944, and a chalan under rules 81 (4) and 121, D.I.R., filed on that day. Thereupon the Chief Presidency Magistrate made an order transferring the case to another magistrate. Later, on the same day the appellant was brought before tha Magistrate who adjourned the case to the 16th May, 1944, for evidence and made an order directing that the appellant should give bail in Rs. 200 to appear on the 16th May. On the 16th May, it was noted on the Order Sheet that sanction had not been received. Nonetheless the Magistrate made further orders directing that the case be adjourned to the 24th May for evidence, that the prosecution witnesses be summoned for that day and for bail as before. Against the entry of the 24th May, 1944, a note appears in the margin of the record "sanction filed" and the entry proceeds to record that three prosecution witnesses were examined and a further adjournment ordered. Thereafter the case is recorded as proceeding in the usual way up to conviction and sentence on the 29th June, 1944.

From this it is clear that the sanction was not filed until the 24th May 1944, but that in the meantime from the 2nd May onwards the prosecution had been put in motion and various steps taken by the Magistrate. It would

1. (1943) M.W.N. 612: Cr. 149 F.C.

appear that when the absence of sanction was noted, it was considered to be a matter of little importance, which it could be assumed would be put right in due course, and which should not interrupt the ordinary course of a prosecution.

In the High Court also it appears to have been considered that this point raised little more than a mere technical objection and that as the more material part of the prosecution proceedings did not take place until after the sanction had been received, it was possible to ignore the fact the proceedings had been instituted without such a sanction. In this Court too we were asked to treat the matter on much the same lines, being invited to hold that whilst, no doubt, all that had been done in the matter prior to the 24th May was without jurisdiction that could be severed from the subsequent proceedings and the latter be regarded as separate and fresh proceedings properly sanctioned. In this connection we were also referred to ss. 196 and 197 of the Code of Criminal Procedure and cases decided in connection with such sections. But having regard to the difference in the wording of the sections in question as compared with the wording of clause 16 of the Drugs Control Order, 1948, we were unable to get any material assistance from such cases.

In our view the absence of sanction prior to the institution of the prosecution cannot be regarded as a mere technical defect. The clause in question was obviously enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of each particular case be instituted at all. Such a clause, even when it may appear that a technical offence has been committed, enables the Provincial Government, if in a particular case it so thinks fit, to forbid any prosecution. The sanction is not intended to be and should not be an automatic formality and should not be so regarded either by police or officials. There may well be technical offences committed against the provisions of such an Order as that in question, in which the Provincial Government might have excellant reason for considering a prosecution undesirable or inexpedient, But this decision must be made before a prosecution is started. A sanction after a prosecution has been started is a very different thing. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and a subsequent refusal of sanction to a prosection cannot possibly undo the harm which may have been done by the initation of the first stages of a prosecution. Moreover in our judgment the official by whom or on whose advice a sanction is given or refused may well take a different view if he considers the matter prior to any step being taken to that which he may take if he is asked to sanction a prosecution which has in fact already been started.

In our judgment the words of clause 16 of this Order are plain and imperative. and it is essential that the provisions should be observed with complete srtictness and where prosecutions have been initiated without the requisite sanction that they should be regarded as completely null and void, and if sanction is subsequently given, that new proceedings should be commenced *ab initio*. Only so can the protection intended for the citizen be assured. In our judgment the prosecution in this case was clearly instituted without the previous sanction required by clause 16, and it is not possible to sever the proceedings prior to the 24th May, from those occurring on and after this date. Consequently as when the sanction was obtained, no new start was made. the whole proceedings in this case are null and avoid.

The appeal must accordingly be allowed and we direct the case to be remitted to the High Court and declare that in place of the conviction recorded against the appellant an order shall be made quashing all the proceedings for want of jurisdiction. The appellant will be released from his bail and the fine if paid will be refunded.

—— *Appeal allowed.*

Criminal Revision Case No. 54 of 1945
(Criminal Revision Petition No. 53 of 1945)
March 22, 1945
HAPPELL, J.

Manager, Indian Express, In re*

Motor Vehicles Act (*IV of* 1939), *Ss. 2* (8), 42 (1) & 123—*Goods vehicle—What is.*

A *motor car owned by the petitioner was twice used for taking bundles of newspapers from his office to the railway station; and the petitioner held no permit for the use of the motor car as a transport vehicle.*

Held, *that the petitioner was guilty of contravening section* 42 (1) *of the Motor Vehicles Act.*

*1945 M.W.N. 430

The word 'solely' in the definition of 'goods vehicle' in S. 2 (8) of the Act is used in contra-distinction to the words which follow viz., 'in addition to passengers'. It makes no difference to the answer to the question whether a particular vehicle is a goods vehicle, whether in addition to goods passengers are carried or not.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Chief Presidency Magistrate, Egmore, dated 21-9-1944 and made in M. V. No. 379 of 1944.

B. T. Sundararajan & Vepa P. Sarathy, for Petr.

C. D. Venkatarmanan, for Crown.

ORDER

The petitioner has been convicted by the learned Chief Presidency Magistrate of an offence under the Motor Vehicles Act and has been sentenced to pay a fine of Rs. 50. The facts as proved are that a motor car owned by the petitioner was twice used, on the 1st of July and a week before, for taking bundles of newspapers from the office of the Indian Express to the railway station. Section 42(1) of the Motor Vehicles Act prohibits the use of a transport vehicle save in accordance with the conditions of a permit and section 123 provides the punishment for an offence in contravention of section 42(1). A goods vehicle is by definition a transport vehicle (Section 2 (34) of the Motor Vehicles Act); and "goods vehicle" is defined in Section 2 (8) as follows:

"Goods vehicle' means any motor vehicle constructed or adapted for use for the carriage of goods or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers".

The petitioner held no permit for the use of the motor car as a transport vehicle, and accordingly if the motor car was a "goods vehicles" as defined in Section 2 (8) by reason of the fact that it was used twice to carry newspapers to the station, the offence charged was committed. The first part of the definition of "goods vehicle" given in Section 2 (8) of the Act does not apply to the present case. The argument advanced is that the petitioner's motor car is not a goods vehicle within the meaning of the second part because it was used only twice for the carriage of goods and so has not been used solely for the carriage of goods or solely for the carriage of goods in addition to passengers. This is a quite untenable construction. The view taken by the Chief Presidency Magistrate that the word "solely" is in contra distinction to the words which follow viz. "in addition to passengers" is undoubtedly correct; and he puts the meaning of "solely" in the context clearly when he says "in other words it makes no difference to the answer to the question whether a particular vehicle is a goods vehicle, whether in addition to goods, passengers are carried or not." The second part of the definition of "goods vehicle" as it stood before amendment was "or a motor vehicle not so constructed or adapted which is habitually used for the carriage of goods and not of passengers." This was an obviously unworkable definition and it cannot be believed that the Legislature substituted for it a definition which would enable a motor vehicle to be used for the carriage of goods without a permit provided that it was used for the carriage of passengers only for one or two days in the year. The petitioner, in my opinion, was rightly convicted. The petition is therefore dismissed.

N.T.R. — *Petition dismissed.*

Cr. M. P. No. 195 of 1945

April 26, 1945

KUPPUSWAMI AYYAR, J.

Marudai Pillai, P. C. 232 & others In re*

Criminal Procedure Code (V of 1898), *S.* 476 *—Provisions of—Exhaustive - Police Standing Order No.* 157*—Sub-divisional Magistrate conducting enquiry under—A court —If can file complaint as 'court'.*

A complaint outside the provisions of S. 476 *Criminal Procedure Code cannot be filed by a civil revenue or criminal court under its inherent jurisdiction. When the Code has made provision for circumstances under which a court can file a complaint it must be considered to be exhaustive in respect of it and to limit the powers of the court in making such complaints.*

A Sub-Divisional Magistrate acts as a court when he is investigating a case sent to him under Police Standing Order 157. *A complaint filed by him as a 'court' is without jurisdiction; although the offences may be cognizable ones the proceedings ought to be quashed.*

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order quashing the proceedings in C. C. No. 544 of 1944, on the file of the Court of the Sub Divisional Magistrate, Musiri.

G. Gopalaswami & A. R. Krishnaswami, for Petr.

Asst. Public Prosecutor (*A. S. Sivakaminathan*), for Crown.

*1945 M W N 431

ORDER

One Sellamuthu happened to be sent to the headquarters hospital at Trichinopoly in connection with certain injuries found on his person and on information given by him to the District Medical Officer the Medical Officer thought that the injuries had been caused to him by the police personnel of Turaiyar. As he was of the opinion that the injuries were serious ones likely to result in death he sent up the papers to the district magistrate stating that certain allegations had been made against the police personnel of Turaiyur and that it was desirable that there should be an enquiry and steps taken to see that the culprits were punished if they had really committed any offence. The district magistrate on receipt of the papers sent them on to the sub divisional magistrate of Trichinopoly who was also in additional charge of the Musiri sub division within which division the offence if any had been committed to make inquiries and report. The papers evidently appear to have been sent under Police Standing Order No. 157. The magistrate made inquiries but by the time he finished his inquiries another gentleman took charge of the Musiri sub-division but the sub-divisional magistrate of Trichinopoly continued the inquiry and was of the opinion that a *prima facie* case had been made out. He then sent a report to the sub-divisional magistrate of Musiri but the latter wrote back to him saying that he could take action only if a complaint was sent to him. Thereupon the sub-divisional magistrate of Trichinopoly as Rex by the sub-divisional magistrate of Trichinopoly gave a complaint. On that, notice was issued to all the petitioners before this court, and after inquiry a charge was framed. After charge was framed the petitioners raised an objection that the sub-divisional magistrate of Trichinopoly had no jurisdiction to file a complaint and the proceedings started on such a complaint were illegal and that they should be quashed. The magistrate held that the objection was untenable and overruled it. The very same objection is reiterated here and it is stated that the proceedings should be quashed.

The complaint clearly indicates that it was as that of the sub-divisional magistrate of Trichinopoly it was forwarded to the sub divisional magistrate of Musiri. As a matter of fact the latter officer wanted such a complaint. Police Standing Order No. 157 clearly indicates that it is as sub divisional magistrate he was asked to investigate and report and so it is as a court that he made the investigation and came to the conclusion that a *prima facie* case had been made out. As pointed out in *Emperor* v *Kushal Pal Singh* [1] a complaint outside the provisions of S. 476 cannot be filed by civil, revenue or Criminal Court under its inherent jurisdiction. My attention has not been drawn to any provisions of the Code of Criminal Procedure except S. 190 under which this complaint should have been sent by the sub-divisional magistrate of Trichinopoly. The offences with which the petitioners have been charged are cognizable offences and it is open to any citizen to file a complaint but then the complaint has not been filed by the magistrate as an ordinary citizen but by the sub-divisional magistrate of Trichinopoly in his capacity as such magistrate. There is some difference in the procedure between an inquiry into a complaint by a private individual and a complaint by a court. This was pointed out in *Emperor* v. *Kuhsal Pal Singh* [1]. When the Code has made provision for circumstances under which a court can file a complaint it must be considered to be exhaustive in respect of it and to limit the powers of the court in making such complaints. Consequently it cannot be said that the magistrate had jurisdiction to file the complaint in this case.

It is urged however that even though he had no jurisdiction to file a complaint, still if such a complaint was received, the sub-divisional magistrate of Musiri could act under S. 190 (c) and take cognizance of the case and the action of the sub-divisional magistrate must be considered to have been taken under that section. If that be so then under S. 191 it is open to the accused to object to the case being tried by the magistrate and ask for the case being tried by another magistrate. The petitioners have been deprived of the exercise of such a right by reason of the failure on the part of the sub divisional magistrate of Musiri to inform the petitioners about it and ask them whether they wanted the case to be tried by another magistrate.

The charge framed is therefore set aside. The magistrate will ask the petitioners if they want to have case tried by another magistrate and then proceed with the matter according to law.

N. T. R.

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1. (1931) 53 All. 804 (812) F.B.

Cr. R. C. No. 618 of 1944
(Cr. R. P. No. 585 of 1944)
November 22, 1944
HAPPELL, J.
Kathari Lakshmayya & others v. **Emperor***

Cr. P. C. (*V of* 1898) *S. 43—Enquiry into an offence under section* 307, *I. P. C.—Charge by magistrate for offence under Ss.* 147, 323 *and* 325*—Additional District Magistrate, if can direct committal to sessions.*

The Sub-Magistrate decided after hearing the prosecution evidence and the arguments that no case had been made out of an offence under S. 307, *I. P. C. and framed charges under Ss.* 147, 323 *and* 325. *An application was made to the Additional District Magistrate to revise the order of the Sub-Magistrate and to direct commitment of the accused to the Court of Sessions for trial under the charge of attempted murder as well as the other charges.*

Held, *that as the accused had in effect been discharged by the sub-magistrate in respect of the offence under S.* 307, *the Additional District Magistrate was competent to set aside this order of discharge and direct that the accused be committed to the sessions.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the order of the Court of the Additional District Magistrate of West Godavari at Ellore in Cr. R. P. No. 13 of 1944 dated 13-7-44 (P.R.C. 9 of 1943, Stationary SubMagistrate's Court, Narasapur.)

B. Jagannada Das & V. Parthasarathi, for Petr.

Assistant Public Prosecutor (*A. S. Sivakaminathan*), for Crown.

G. Gopalaswami for complainant.

ORDER

The petition in this case is in substance to quash the commitment of the petitioners to take their trial at the Sessions Court by the Additional District Magistrate of Ellore. The charge-sheet filed by the police was enquired into by the Stationary Sub-Magistrate of Narasapur under the provisions of Chapter XVIII of the Criminal Procedure Code. But when the prosecution evidence has been let and, after hearing the arguments of both parties, he decided that no case had been made out of an offence under section 307 and accordingly framed charges under sections 147, 323 and 325 of the Indian Penal Code and converted, as he says, the case to a calendar case triable by himself. The Stationary Sub-Magistrate embodied his decision to frame charges against the accused only under sections 147, 323 and 325 of the Indian Penal Code in an order which he passed on the 30th March 1944. The order of the Additional District Magistrate now under consideration was passed on an application to him to revise the order of the Stationary Sub-Magistrate of the 30th March 1944 and to direct commitment of the accused to the Court of Sessions for trial under the charge of attempted murder as well as the other charges.

The commitment was made under section 213, Criminal Procedure Code, and under section 215 a commitment made under section 213 can be quashed by the High Court only on a point of law. I propose, therefore, to say nothing on the merits of the case. The point of law taken is that the Additional District Magistrate was not competent to entertain the revision petition and to order commitment because the case before the Stationary Sub-Magistrate was still proceeding, and because as I understand the contention, the Sub-Magistrate might still elect to commit the case himself. In support of the contention I have been referred to the decision of the Bench of this Court in *Gandiappa Raju* v. *King Emperor* [1]. This case has no application in so far as it is contended that it assists the petitioner. On the contrary, it is authority for the view that the Additional District Magistrate had jurisdiction to make the commitment of the accused which he did. The real question in *Gandiappa Raju* v. *King Emperor* [1] was whether a prior order made on an application to the District Magistrate precluded the Sessions Judge, when an application was made to him, from directing the commitment of the accused. It was held that it did not, because the trial of the case was at a different stage when the application was made to the District Magistrate and when it was made to the Sessions Judge and because the District Magistrate had refused to consider the application on its merits. The learned Judges who decided *Gandiappa Raju* v. *King Emperor* 1], however, were of the opinion that the commitment by the Sessions Judge was correct. In the case which was under consideration in *Gandiappa Raju* v. *King Emperor* [1] the case had been taken on file under sections 147 and 304 but a charge had been framed under section 147 only. The accused therefore, had in effect been discharged in respect of the offence under section 304, and from the judgment of Krishnan, J. in *Gandiappa Raju* v. *King Emperor* [1] it appears that the Sessions Judge

* (1945) M.W.N. 433

1. (1920) I.L.R. 43 Mad. 330

was held to have been competent to make the order which he did because the accused had been discharged in respect of the offence under section 304. In the present case, both the order passed by the Magistrate and the charge which he has framed show that, as far as the charge under section 307 is concerned, the accused was discharged. The Additional District Magistrate, in my opinion, was therefore competent to set aside this order of discharge and direct that the accused be committed to take their trial at the Sessions Court.

The petition is dismissed.

N.T.R. —— *Petition dismissed.*

Cr. R. C. No. 356 of 1945
(Cr. R. P. No. 332 of 1945.)
June 26, 1945.
CLARK, J.

S. S. Vasan alias T. S. Srinivasan In re*

Newsprint Control Order (1941)—*Clause* 3 (6)— *'Newspaper,' if includes supplement—Defence of India Rules, Rule* 81 (4).

An annual supplement issued on the occasion of an annual festival by the proprietor of a newspaper cannot be regarded as a newspaper for the purpose of sub-clause (6) *of Clause* 3 *of the Newsprint Control Order,* 1941. *Hence the proprietor is not guilty of an offence in using paper other than newsprint for the production of the annual supplement.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the 3rd Presidency Magistrate Egmore of the Court of the Presidency Magistrates, Egmore, Madras dated 29-3-45 and passed in C. C. No. 294 of 1945.

V. C. Gopalaratnam & B. T. Sundararajan, for Petr.

Crown Prosecutor, (*P. Govinda Menon*) for Crown.

ORDER

The petitioner is the proprietor and editor of Anandavikatan, a Tamil weekly. He has been prosecuted and convicted under R. 81(4) of the Defence of India Rules read with Clause 3 (6) of the Newsprint Control Order of 1941. The case for the prosecution was that the petitioner had used paper other than newsprint for the production of an annual supplement to Anandavikatan issued by him at Deepavali in the year 1944.

Sub-clauses 1 to 5 of Clause 3 of the Newsprint Control Order, 1941, impose restriction on the sale and purchase of newsprint. It is only to be sold to and purchased by the proprietors of newspapers. Sub-clause (5) prohibits the proprietor of a newspaper or of a newspaper press from using newsprint for any purpose other than the printing of newspapers. Sub-clause (6) prohibits the proprietor of a newspaper from using in the printing of his newspaper any kind of paper other than newsprint.

Sub-clauses (5) and (6) are as follows :—

"(5) No proprietor of a newspaper or of a newspaper press shall use newsprint for any purpose other than the printing of newspapers except under an Open General Permit issued by the Central Government or under a permit in Form II granted by the Central Government or by an officer authorised by the Central Government in this behalf.

Explanation :—In this sub-clause 'newspaper' includes any supplement or annual edition of a newspaper, but, does not include a poster.

(6) No proprietor of a newspaper to whom a permit to purchase or to use newsprint has been issued shall use in the printing of the newspaper any kind of paper other than newsprint except with the permission in writing of the Central Government."

The whole question at issue in this prosecution is whether the supplement issued by the petitioner at Deepavali in 1944 is properly to be regarded as a "newspaper" for the purpose of sub-clause (6) of clause 3 of the Order. On behalf of the Government it is urged that "newspaper" ordinarily includes a supplement and that the explanation to sub-clause (5) must be regarded as having been inserted *ex abundati cautela.* On this view the meaning to be given to the word "newspaper" in sub-clause (6) and sub-clause (5) is the same. Further, reference is made to the definition of "newspaper" in S. 1 of the Press and Registration of Books Act, XXV of 1867. Reference is also made to the definition of "newspaper" in the Newspaper Control Order 1944. I do not consider that either on these definitions of "newspaper" would ordinarily include a supplement. Whether it would be included under the definition in the Act of 1867 depends on whether the supplement contains public news or comments on public news. The supplement in this case was issued on the occasion of an annual festival, and whilst it may well have contained comments on the news for the past year, I do not consider that it could ordinarily be regarded as "newspaper" on that account.

As regards the definition in the Newspaper Control Order, 1944, it is, I think, quite clear that the supplement in the present case could not fall within that definition. Admittedly, as is shown by Exs. I and II in this case, the petitioner before publishing the supplement addressed the Government stating his intention to issue supplement printed on **"glaze paper, real and imitation art paper",**

* (1945) M.W.N. 434.

and asking that he might be permitted to exceed his quota of 30 percent of the normal amount of paper used. That application was refused. I may state here that it is not suggested before me that the petitioner in issuing this supplement exceeded the 30 per cent quota allowed to him. This quota is in respect of paper other than newsprint. But these facts make it quite clear that the supplement was not intended to be a "newspaper" within the definition of that term in the Newspaper Control Order, 1944, for it was not a "periodical publication printed on newsprint".

Accordingly I am unable to accept the contention that the expression "newspaper" is to be regarded ordinarily as including a supplement. The question then arises whether it can properly be regarded as having that meaning under sub-clause (6) of clause 3 of the Order of 1941. If it can, then the petitioner was properly convicted for having used paper other than newsprint for the purpose of producing his supplement. If it cannot, his conviction must necessarily fail. It has been pointed out that sub-clause (6) was added in 1944, that is, three years after the issue of the Order. On this fact being pointed out, I asked whether it was suggested that the failure to add an explanation to sub-clause (6) like that following sub-clause (5) was a mistake; but this suggestion was not accepted. Clearly it could not be accepted by the Government if they wish to succeed in this appeal. It has many times been laid down that the Court will not supply even an obvious omission if to do so would render an accused person liable to conviction--Maxwell on Interpretation of Statutes, Eighth Edition, page 239.

It seems clear to me that the addition of the explanation to sub-clause (5) and the omission of that explanation to sub-clause (6) are both intelligible and proper. As I have earlier stated, sub-clause (5) prohibits the proprietor of a newspaper or of a newspaper press from using newsprint for purposes other than the production of newspaper. It is significant that the prohibition operates against the proprietor both of a newspaper and of a newspaper press. The proprietor of a newspaper press as such does not appear to be entitled to obtain newsprint. It is only the proprietor of a newspaper who can obtain newsprint, but he may in many cases hand it over to the proprietor of a newspaper press for the purpose of printing, and both are brought within the prohibition of sub-clause (5). It must have appeared to those framing this order and its subsequent amendments that it might in some cases be convenient to print the supplement to a newspaper on newsprint. On that account it would necessarily have been unsuitable to prohibit the person concerned from using newsprint for the propose of printing a supplement. In my view the explanation to sub-clause (5) is by way of exception or extension to meet that possibility. The need for such exception is obviously not present in sub-clause (6) which imposes a prohibition on the use of any other paper than newsprint for the production of a newspaper. As I have said, it may well be that newsprint might be used for a supplement but equally it might not be. It might in many cases be convenient and desirable--as it would appear to have been the case here--to produce an annual supplement on paper other than newsprint, for example art paper or glaze paper. That being so, the explanation would necessarily be unsuitable in connection with sub-clause (6).

For these reasons I am satisfied that there has been no offence committed by the petitioner and that his conviction cannot stand. Accordingly the conviction will be quashed and the fine paid will be returned to the petitioner. The petition is accordingly allowed.

N.T.R. —— *Conviction set aside.*

Criminal M. P. Nos. 127 & 128 of 1945

February 12, 1945.

BYERS, J.

The Crown Prosecutor, Madras.

v.

N. S. **Krishnan** & another*

Criminal Procedure Code (V of 1898) Sections 497 (5), 498 & 561A — Powers of High Court to cancel bail and order re-arrest.

Although section 497 (5) of the Code can have no application to the case of an accused person who has been released on bail under section 498 of the Code, the Court has adequate jurisdiction under section 561-A of the Code to continue or discontinue an order granting bail which enures for a limited period only.

Petition praying that in the circumstances stated in the affidavit filed with Cr. M. P. No. 128 of 1945 on the file of the High Court, the High Court will be pleased to cancel the orders dated 29th December, 1944 releasing the respondents on bail and passed in Cr. M. P. Nos. 1221 and 1214 of 1944 respectively, and to direct them to be arrested and remanded to custody pending the completion of the Preliminary enquiry before court of the Chief Presidency Magistrate, Egmore, Madras.

Crown Prosecutor (P. Govinda Menon), in person.

* 1945 M.W.N. 435

V. V. Srinivasa Iyengar, V. Rajagopolachari and Govinda Swaminathan for Respts.

ORDER.

These petitions have been filed by the Crown Prosecutor, Madras, under Section 497 (5) of the Code of Criminal Procedure for the re-arrest of the two respondents under the following circumstances.

These respondents were arrested by the police on 27th December 1944, in connection with the death of one Lakshmikantham, who is alleged to have been murdered on the morning of 8th November, 1944, in Vepery, Madras, by two persons named Vadivelu and Nagalingam. Their application for bail was rejected by the Commissioner of Police, Madras in his capacity as a Presidency Magistrate but on an application to the vacation Judge of this Court they were enlarged on bail on 29th December, 1944, by Patanjali Sastri, J., pending the investigation of the case against them. The conditions were that each of them should execute a bond for Rs. 10,000 with two sureties each for Rs. 10,000 and they were directed to leave Madras immediately after their release and not to visit or remain in Madras until the commencement of the trial of the case.

The grounds on which their application for bail was based were that they were not arrested until seven weeks after the alleged murder, that they had no connection with it whatever, and that they were innocent. The respondent Bagavathar further alleged that he must have been falsely implicated in the case. The charge-sheet has since been filed before the Chief Presidency Magistrate on 27th January, 1945, against eight accused, of whom these respondents are the third and fourth accused. Briefly, the case against these respondents is that they were members of a criminal conspiracy to murder the deceased, in pursuance of which he was attacked and stabbed on 8th November, 1944, by Vadivelu and Nagalingam. In the affidavit supporting these petitions it is stated that in addition to the material available at the time when these respondents were arrested and released on bail, further evidence has been obtained showing that these respondents were active members of the conspiracy and that they hired other members of it to murder the deceased. The learned Crown Prosecutor has stated before the Court that there is now clear and cogent evidence available in proof of the guilt of the respondents, and he presses for the revocation of the previous orders granting bail and the re-arrest and committal of the respondents to custody.

The main objection taken by both the learned counsel for the respondents is that the power conferred by Section 497 (5) of the Code of Criminal procedure to cancel bail and re-arrest an accused is expressly limited to cases in which the accused has been released under Section 497 of the Code, and that the provisions of clause (5) of this section have no application to an accused person who has been released on bail under Section 498. On the facts now before the Court it is abundantly clear that these respondents were not released on bail under section 497 of the Code, which applies only when a person is released on bail at the time of his remand, enquiry or trial but under section 498 of the Code after their prior application had been refused by the Presidency Magistrate. Section 497 (5) is in these words:

> "A High Court or Court of Session and in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody."

Mr. V. V. Srinivasa Iyengar contends that the words of this clause are devoid of any ambiguity and that they expressly limit the power to revoke bail and direct the re-arrest of an accused to cases in which bail has been granted under Section 497 of the Code.

The learned Crown Prosecutor meets this argument in two ways; his first submission is that the decision of this court in the *Public Prosecutor* v. *Sanyasayya Naidu* [1] is against this view and his second submission is that quite apart from section 497 (5) of the Code, the Court has power to make such an order in the exercise of its inherent jurisdiction under section 561-A of the Code.

In the case cited five persons charged with the murder had been enlarged on bail by one of the learned Judges of this Court after previous attempts to obtain it had failed, and a few days later an application was made to revoke the bail granted and to remand them to custody. The power to make such an order was questioned before the Bench but the learned Chief Justice with whom Srinivasa Ayyangar, J. agreed, held that the Court had ample jurisdiction to direct the re-arrest of any person out on bail. The portion of the judgment dealing with this aspect of the matter is somewhat brief, and it seems open to considerable doubt whether the argument now put forward by Mr. Srinivasa Ayyangar was raised in that case. This is how the learned Chief Justice dealt with the contention then advanced:

1. [1925] 22 L.W. 162

"The accused applied for bail and ultimately bail was granted, on the information then before him by my learned brother in this Court. It was first argued that, under the Code there was no power inherent in this Court to revise any such grant of bail. I have never been able to see the difficulty. Section 497 (1) of the Code of Criminal Procedure runs as follows: 'When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought, before a Court, he may be released on bail. That is what happened here. By sub-section 5 of that section the Courts therein described 'may cause any person' who has been released under this section, to be arrested and may commit him to costody.' In the face of that the argument that there is no power in this Court, whatever change of circumstances may be proved before it to revise the order granting bail seems to be absolutely untenable. I hold that we have ample jurisdiction to exercise our discretion and order the re-arrest of any person out on bail, if we feel the circumstances warrant or demand such a course."

The reference in this judgment to the Court's inherent power and the exercise of its discretion suggests that section 561-A of the Code was the basis of the argument then advanced and that no attempt was made to press before the Court the limitations imposed by the words of clause (5) of section 497. This view receives considerable support from the way in which the learned Chief Justice expressed himself. After referring to the circumstances under which the accused were ultimately released by his learned brother and after quoting the first part of section 497 (1) of the Code, he remarked "That is what happened here." If previous applications for bail had been refused, as the use of the word "ultimately" in the opening portion of the judgment suggests, then with the greatest respect to the learned Chief Justice he appears to have been under a misapprehension. If there had been previous but unsuccessful applications for bail, then the ultimate release of the accused by Srinivasa Iyengar, J., was not under section 497 but was under section 498 of the Code. Obviously this point was never urged before the learned Judges, and I consider the learned counsel is right in his contention that this decision should not be regarded as binding authority on the scope of section 497 (5) of the Code, although from some of the expressions used by the learned Chief Justice it must be regarded as authority in support of the view that the Court can make such an order in the exercise of its inherent jurisdiction under section 561-A of the Code.

In *Local Government* v. *Gulam Filani* (2) objection was taken to the jurisdiction of the High Court to interfere with an order by a Sessions Judge granting bail under section 498 of the Code after an earlier application before the committing Magistrate had failed. This is how the learned Judge disposed of the matter:

"There is much force in this argument addresed in support of the preliminary objection, and I am inclined to the view that the applications for revision as laid down under Section 497 sub-section (5) are not maintainable. I am further of opinion that they are not maintainable under section 498 as it stands but at the same time I am of opinion that this does not and cannot mean that the High Court has no power to interfere with orders made in proceedings for bail when such proceeding are proved to be illegal."

The learned Judge then went on to discuss the extent to which sections 439 and 561-A of the Code were applicable; but in the present case section 439 has no application, and it only remains to discuss how far section 561-A of the Code can be relied on.

The learned Crown Prosecutor contends that if the Court should consider that section 497(5) of the Code has no application to cases of this kind, the Court has nevertheless ample jurisdiction under section 561-A to cancel the bail and to re-commit an accused person to custody. The learned counsel for the respondents meet this argument with the contention that wide as the powers of the Court may be under section 561-A of the Code, they do not enable the Court to create jurisdiction which it does not possess or to enlarge jurisdiction which is expressly limited by the section which confers it. There is no necessity to refer to the ample authority in support of this view, because if the terms of the orders enlarging these respondents on bail are examined it will readily be seen that by directing their re-arrest there can be no question of the Court now exercising a jurisdiction which it does not possess.

The orders in each case are identical, and they are in these words:

"It is ordered that pending the said investigation in Crime No. 2201 of 1944 on the file of the Crime Branch, Madras, the petitioner herein be released on bail on his furnishing security in his own bond for the sum of Rs. 10,000 with two sureties each for Rs. 10,000 to the satisfaction of the Chief Presidency Magistrate, Egmore, Madras and it is further ordered that the petitioner herein do leave Madras by the earlisst train after his release and that the said petitioner shall not be in or visit Madras till the commencement of the trial of this case by the Magistrate."

If the learned Judge had without any qualifications ordered the release of the respondents on bail pending the disposal of the case

2. [1925] A.I.R. Nag. 228

against them, then I should de disposed to accept Mr. Srinivasa Iyengar's argument that in the absence of extraordinary circumstances or a breach of the conditions the Court would have no jurisdiction to amend or interfere with an order in such absolute terms; but it is clear from the terms of these orders that Patanjali Sastri, J., did not contemplate any period beyond the investigation of the case during which the respondents were to be on bail. There can be no doubt that the learned Judge left open entirely the question whether the respondents were to continue at large after the police had completed their investigation, and there would appear to be nothing to have prevented the police from applying to the Presidency Magistrate on the presentation of the charge-sheet to commit the respondents to custody.

It may be stated that in practice cases of this kind can rarely present any real difficulty, because orders granting bail usually conclude with a saving clause such as "or until the further orders of the Court"; so that quite apart from the provisions of sections 497 (5) and 498 of the Code, the Court thereby reserves to itself liberty to amend its orders as circumstances may require.

On the merits something has been said about the probability of these respondents interfering with the witnesses, but in the absence of any definite allegations of this kind, I do not attach much importance to this suggestion. The affidavit in support of the application suggests that the fact of these respondents continuing, at large will, on account of their considerable influence, have a psychological effect on the prosecution witnesses. Although learned counsel have strongly criticised this suggestion, there is no doubt that influential and powerful accused can and do bring pressure to bear on persons who are known to be giving evidence against them. However, this aspect of the matter requires no further consideration because it must be apparent that persons charged with murder can be enlarged on bail pending their trial only under exceptional circumstances. The learned Crown Prosecutor quite rightly states that he does not propose to refer at this stage to the evidence now available against these respondents. He states that there is satisfactory evidence available in proof of the charge against them, and that statement is entitled to considerable weight.

The result is that although section 497 (5) of the Code can have no application to the case of an accused person who has been released on bail under section 498 of the Code, I consider that in the present case the Court has adequate jurisdiction under section 561-A of the Code to continue or discontinue an order granting bail in these circumstances which enures for a limited period only. The respondents are accordingly ordered to be rearrested and committed to custody pending the completion of the committal proceedings against them or until the further orders of this Court.

N.T.R. — *Bail cancelled.*

Cr. R. C. No. 828 of 1944

Cr. R. P. No. 781 of 1944

January 5, 1945

HAPPELL, J.

S. Devaraja Tharakan

v.

Emperor*

Food Grains Control Order (1942), *Rule* 3 (2) —*Defence of India Rules, Rule* 81 (4)—*Storing in wholesale quantities—Order for confiscation—Extent of.*

Once a person is found to be storing grain for sale in wholesale quantities, he is committing an offence in respect of the whole amount which he is storing and he cannot be heard to say that there is no offence committed in respect of the grain upto 20 maunds but only an offence for the amount in excess of the 20 maunds.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of North Malabar Division in C. A. No. 15 of 1944 (C. C. No. 349 of 1944 on the file of the Court of the Joint Magistrate, Tellicherry).

C. D. Venkataramanan, for Petr.

Assistant Public Prosecutor (*A. S. Sivakaminathan*), for Crown.

ORDER

The petitioner has been convicted of an offence under the Food Grains Control Order and sentenced to pay a fine of Rs. 400. The grain in respect of which the offence was committed was also ordered to be confiscated. The conviction was based on the fact that the petitioner was in possession of 50½ maunds of paddy. Rule 3 (2) of the Food Grains Control Order provides that for the purpose clause 3(1) any person who stores food-grains in quantities exceeding 50 maunds may, unless the contrary is proved, be deemed to

* [1945] M.W.N. 438

store the grains for purposes of sale. The petitioner was therefore deemed to have stored 50½ maunds of paddy for purposes of sale.

The propriety of the conviction is not now canvassed, but it is argued that the order of confiscation should have been confined only to the paddy in possession of the petioner in excess of 20 maunds for the reason that storage for sale is not an offence in itself but only storage for sale in wholesale quantities "storage for sale in wholesale quantities" meaning, as defined in Rule 2 (e) quantities exceeding 20 maunds. This contention, it is argued, should be accepted in view of the wording of rule 81 (4) of the Defence of India Rules which provides that a Court trying a contravention of an order may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty. The argument is based on a misconception. Once a person is found to be storing grain for sale in wholesale quantities, he is commiting an offence in respect of the whole amount which he is stroing and he cannot be heard to say that there is no offence committed in respect of the grain upto 20 maunds but only an offence for the amount in excess of the 20 maunds. The order of confiscation of the whole of the grain was therefore justified.

The petition is dismissed.

N. T. R. — *Petition dismissed.*

FEDERAL COURT

(Appeal from Patna)

January 19, 1945

SIR PATRIK SPENS, C.J., SIR S. VARADACHARIAR & SIR MD. ZAFRULLA KHAN, JJ.

Basanta Chandra Ghose v. Emperor

Restriction and Detention Ordinance (III of 1944) Cl. 11 *sub-cl.* (2) — *If* ultra vires— *Subsequent facts after order of detention Constitution Act, Ss. 59* (2) & 93.

Ordinance III of 1944 *is not* ultra vires *the Governor-General in so far as it purported to authorise detention on the ground that the detenue was likely to act in a manner prejudicial to the efficient prosecution of the war, as it has to be understood in the light of the circumstances in which the ordinance come to be passed, that the efficient prosecution of the war was necessary for the defence of India within the ambit of the List in Sch. VII, of the Constitution Act.*

Cl. 11 *of the Ordinance and sub-cl.* (2) *of it are not invalid, as they are not intended to affect the provisions of the Evidence Act permanently but only prohibits certain things being done during the currency of the Ordinance.*

There is nothing in the Proclamation under S. 93 *to exclude the application of S.* 59 (2) *of the Constitution Act or Cl.* 10 (3) *of the Ordinance.*

The mere fact that detenue challenges the factum or the bona fides of the order or the fact that the officers of Government must naturally be in possession of information on the subject cannot be said to be 'proof to the contrary' so as to make it incumbent on the Government to adduce evidence in support of the order.

Where an earlier order of detention is held defective merely on formal grounds, there is nothing to preclude a proper order of detention being based on the same grounds. If at any time before the court directs the release of the detenue a valid order of detention is produced, the court cannot direct his release on the ground that at the previous stage there was no valid cause for detention.

S. C. Ghose & B. C. De instructed by *Gurudayal Sahay*, for Applt.

Sir Brojendra Mitter (Advocate-General of India) & *H. K. Bose* instructed by *K. Y. Bhandarkar* and *Mahabir Prasad* (Advocate-General of Bihar) & *R. J. Bahadur* instructed by *S. P. Varma* for Respt.

JUDGMENT

(SIR PATRICK SPENS, C.J.)

This is an appeal by a detenue against an order of the High Court at Patna dismissing his application under S 491 Cr.P.C. The appellant was arrested on the 27th March, 1942 under an order dated 19th March, 1942 purporting to be made by the Governor of Bihar in exercise of the powers conferred by rule 36 of the Defence of India Rules. The application under S. 491 was filed on 28th April 1943. For one reason or another the hearing of the application was delayed till February, 1944 and in the meanwhile Ordinance III of 1944 was promulgated on the 15th January 1944. The application was dismissed by the High Court; but on appeal this court held that the new Ordinance (Ordinance III of 1944) did not take away the power of the High Court to deal with the matter and accordingly remitted the case to the High Court with a direction that the petition be restored to the file and disposed of in due course of law. The order of this

court was passed on 23rd May 1944. On the 3rd July 1944 the Governor of Bihar passed two orders Nos. 3928-C and 3929-C. By the first he cancelled the order of detention dated 19th March 1942 and by the second he directed, the detention of the appellant on the ground that it was necessary so to do "with a view to preventing him from acting in a manner prejudicial to the maintenance of public order and the efficient prosecution of the war". When the application again came on for hearing before the High Court, reliance was placed by the Advocate-General of Bihar on the order of the 3rd July 1944 and he contended that it was unnecessary in the circumstances to enquire into the validity of the order of the 19th March 1942. Objection was taken on behalf of the detenue to this course and the validity of the orders of the 19th March 1942 and 3rd July 1944 was questioned on various grounds. These contentions were discussed at considerable length by the learned judges of the High Court and they held that the objections were untenable; the petition was accordingly dismissed. Hence this appeal.

Two constitutional points were urged before us. The first was to the effect that the Ordinance No. III of 1944 was *ultra vires* the Governor General in so far as it purported to authorise detention on the ground that the detenue was likely to act in a manner prejudicial to the efficient prosecution of the war. It was contended that legislation relating to the prosecution of the war was not within the ambit of any of the lists in Schedule VII to the Constitution Act and that therefore neither the Indian Legislature nor the Ordinance making authority was competent to legislate in respect of that topic. It was recognised that "preventive detention for reasons of state connected with defence" was a subject specified in Entry No. I in List I but it was urged that it could not be assumed that the prosecution of the war was necessarily a matter of defence and that the war may in certain circumstances be a war of aggression or conquest. We are of the opinion that there is no force in this contention. The reference to "the efficient prosecution of the war" in the Ordinance as well as in the order of detention must be understood in the light of the circumstances in which the Ordinance came to be passed. The language of clause 3 of the Ordinance is only a repetition of the language of section 2 (1) of the Defence of India Act and that Act begins by referring to the proclamation of the Governor-General under S. 102 of the Constitution Act to the effect that the security of India is threatened by the war. Events of which the Court is entitled to take judicial notice were happening in 1942, 1943 and 1944 with reference to which it could clearly be postulated that the efficient prosecution of the war was necessary for the defence of India.

It was next contended that clause 11 of the Ordinance was invalid in so far as it precluded certain matters being adduced in evidence. It was said that this was in effect an attempt to repeal *protanto* certain provisions of the Evidence Act and it was not within the power of the Governor-General to do so by an Ordinance. This contention is misconceived. It was admitted that it was within the power of the Governor-General to enact such a provision to be in force during the time that the Ordinance itself was in force. What was contended was that he had no power to affect the provisions of the Evidence Act permanently. Clause 11 of the Ordinance does not purport to do so. Its words are general. The utmost that could be said is that if the prohibition enacted by it were sought to be enforced after the expiry of the Ordinance, a question might arise as to whether the prohibition would then remain in force. But that is no ground for holding that the clause is invalid even in so far as it prohibits certain things being done during the currency of the Ordinance. Objection was also taken to the validity of sub-clause (2) of clause II. It was contended on the authority of *Chester* v. *Bateson* [1] that such a provision could not be said to be for the peace and good government of British India and could not therefore be held to be authorised by section 72 of the ninth schedule to the Constitution Act. It is unnecessary for the decision of this case to deal with this question even if it were open to the Court to examine the correctness of the decision of the Governor-General as to the requirements of any particular situation.

With the leave of the Court, a number of contentions relating to other aspects of the case were urged before us. As we are of the opinion that there is no substance in any of these contentions, they may be briefly dealt with. It was broadly maintained that neither the order of 19th March, 1942 nor the order

1. [1920] 1 K. B. 829.

of 3rd July, 1944, was a *bona fide* exercise of the power entrusted to the Governor and that they were passed for other ulterior ends unconnected with the maintenance of public' order or the efficient prosecution of the war. It was urged that as the detenue challenged the *bona fides* of the order and as the reasons and circumstances relating thereto were wholly within the knowledge of the officers of Government, it was incumbent upon the Crown to examine these officers to establish the *bona fide* character of the order and that as they have not been examined the Court must draw the inference that the order was not made in the *bona fide* exercise of the power. It was even contended that after the proclamation under section 93 of the Constitution Act the Crown was no longer entitled to rely on section 59 (2) of that Act and clause 10 (3) of Ordinance III of 1944, and that the order of the 3rd July, 1944, should therefore be formally proved. A complaint was also made that the High Court acted improperly in dismissing the application of the detenue to summon Mr. Houlton, the Chief Secretaay to the Government of Bihar, who had signed the orders of the 3rd July, 1944. This line of argument is in our opinion untenable. It was no donbt open to the detenue to show that the order was not in fact made by the Governor of Bihar or that it was a fraudulent exercise of the power. The observations in *Liversidge* v. *Anderson* [2] and *Greene* v. *Secretary of State for Home Affairs* [3], establish that the burden of substantiating these pleas lies on the detenue. In the words of Viscount Maugham, once the order is proved or admitted "it must be taken *prima facie*, that is, until the contrary is proved to have been properly made and that the requisite as to the belief of the Secretary of State (here the Governor) was complied with." As regards proof of the orders, we find nothing in the proclamation under Section 93 to exclude the application of section 59 (2) of the Constitution Act or clause 10 (3) of the Ordinance. The proclamation suspends only so much of section 59 as requires "consultation with the ministers." The mere fact that the detenue challenges the factum or the *bona fides* of the order or the fact that the officers of Government must naturally be in possession of information on the subject cannot be said to be "proof to the contrary" so as to make it incumbent on the government to adduce evidence in support of the order. In *Green's case* [3], Goddard L. J. (as he then was) referred to the possible ignorance of the detenue as to the reasons for his internment and said that that would not shift the burden of proof, because "it in no way shows that the Secretary of State had not reasonable cause to believe or did not believe" that it was necessary to detain the person. Reference was made to *Rex* v. *Carr Briant* [4] as to the extent of the proof required to rebut the presumption in such cases; but as no proof whatever is forthcoming in this case, no question of quantum of proof arises. The detenue no doubt made some sweeping assertions in his affidavits but no materials or sources of information with reference to which these assertions were made were disclosed in the affidavit. No value can therefore be attached to these assertions. Even these affidavits did not assert that the orders of the 3rd July, 1944, were not in fact made by the Governor. As regards the detenue's application to summon Mr. Houlton, it was certainly within the discretion of the learned judges of the High Court to dismiss it, if they considered that it was only an attempt to fish for information that might be turned to some account by the detenue. To permit such a device would practically be to allow the rule as to the onus of proof to be circumvented.

It was next contended that the very fact of the cancellation of the order of 19th March, 1942, by the order of the 3rd July, 1944, and the passing of a fresh order of detention on the 3rd July, 1944 showed *mala fides*. It was said that the orders of the 3rd July, 1944 were passed pending the further hearing before the High Court in order to burke an enquiry into the circumstances connected with the order of March, 1942. We are unable to draw any such inference from the sequence of these orders. Reports of the decisions of this Court and of the High Courts show that during 1943 and 1944 different views were held in different quarters as to the formalities necessary for a valid order of detention and as to the authority entitled to pass such an order. If in view of possible defects of this kind in connection with the order of 19th March, 1942, a fresh order of detention was passed in July 1944, so as to avoid any argument based on such defects such a course will not justify any inference of fraud or abuse of power.

2. (1942) A.C. 206
3. (1942) A.C. 284
4. (1943) 1 K.B. 607

It was next argued as a matter of law that once the order of 19th March, 1942, had been cancelled, there was no power to pass a fresh order of detention except on fresh materials and it was contended that the learned Judges of the High Court were not justified in presuming that fresh materials must have existed when the order of July, 1944 was made. The first step in this argument seems to us unwarranted. The observations of the Court of Appeal in *R* v. *Home Secretary, Exparte Budd* (5) show that in this broad form the proposition is untenable. It may be that in cases in which it is open to the Court to examine the validity of the grounds of detention a decision that certain alleged grounds did not warrant a detention will preclude further detention on the same grounds. But where the earlier order of detention is held defective merely on formal grounds there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds is not examinable by the Courts. There is equally no force in the contention that no order of detention can be passed against a person who is already under detention. The decision of the Patna High Court in *Kamala Kant Azad* v. *King Emperor* (6) cannot be understood as laying down any such proposition as a general proposition of law. The learned Judges seem to have drawn an inference of fact from the circumstances of the case that the order then in question was not one made in the *bona fide* exercise of the Governor's powers.

It was finally contended that the previous order of this Court directed an enquiry into the validity of the detention under the order of the 19th March, 1942 the decision of the High Court must be limited to that question and that it was not open to the High Court to base its decision on the subsequent order of the 3rd July, 1944. This contention proceeds on a misapprehension of the nature of *habeas corpus* proceedings. The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked here. If at any time before the Court directs the release of the detenue, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner.

The appeal fails and is dismissed.

—— *Appeal dismissed.*

5. (1942) 1 All. E.R. 373
6. (1944) 23 Pat. 252

PRIVY COUNCIL
(Appeal from the Federal Court of India)
July 17, 1945
THE LORD CHANCELLOR,
LORD THANKERTON, LORD PORTER,
LORD GODDARD & SIR MADHAVAN NAIR

The King-Emperor*
v.
Sibnath Banerji and others

Habeas Corpus—*Nature of in British jurisprudence—Appeal against order directing discharge—Government of India Act, Ss.* 205 & 206—*Appeal in such cases in India—Cr. P. C., S.* 491—*Limitation on this prerogative writ—Appeal in such cases—Defence of India Act, S.* 2, *sub rules* 1 & 2—*Defence of India Rules, r.* 26—*Not* ultra vires—*Order of detention—Court's power to review grounds—Defence of India Act, S.* 2, *sub-sec.* 5 — *Only supplementary — Ordinary method in Chapter II of Part III of the Act, not excluded—Meaning of 'executive' —Scope of S.* 49, *sub-sec.* 2—*Individual judgment of the Governor—Home Minister, a subordinate of the Governor—Order of detention* ex facie *regular and proper—Onus heavy on detenue to displace presumption under s.* 16 (2) *of the Defence of India Act —Routine order—Meaning of 'personal satisfaction of the Governor'—Statements and answers in Legislative Council—Admissibility.*

It is a well-known and well settled principle of English law that a discharge or an order directing discharge under a writ a Habeas Corpus *is final and not subject to appeal having regard to the importance of preserving safeguards of liberty of the subject. This is fully dealt with in* Cox v. Hakes (1890) 15 *A. C.* 506.

In an application for a writ of Habeas Corpus, *a certificate to appeal to the Federal Court was given uuder S.* 205 (1) *to the Crown and the Federal Court also gave leave under S.* 208 (*b*) *to appeal to the Privy Council.*

Held, *that in view of the special terms of S.* 205, *the appeals were competent.*

The condition of the law of Habeas Corpus *in India and the purpose and express words of S.* 205 *of the Constitution Act afford a contrast to the condition of the English law*

* (1945) M.W.N. 546

and object of the general terms of S. 19 of the Judicature Act.

The power to issue the common law writ of Habeas Corpus *in British India has been taken away by legislation and the powers conferred by section 491, Cr. P. C. substituted therefor. As regards appeal, the position under the Criminal Procedure Code as to proceedings under S. 491 is in effect the same as the position stated in* Cox v. Hakes.

57 *Cal.* 727, approved.

S. 205 *of the Constitution Act relates both to criminal and civil jurisdiction of the High Courts. S.* 205 *provides one of the exceptions referred to in s.* 404 *Cr. P. C.*

R. 26 *of the Defence of India Rules is* intra vires *of the rule-making powers conferred by the Defence of India Act under sub-sec.* 1 *of s.* 2 *of the Defence of India Act. Sub-sec.* 2 *is merely illustrative and not restrictive of sub-sec.* 1.

Talpade's case (1944) *I.L.R. Bom.* 183, overruled.

A court has jurisdiction to investigate the validity of an order of detention, though the burden lies heavily on the challenger. Neither s. 59 (2) *of the Constitution Act, nor s.* 16 *of the Defence of India Act precludes such jurisdiction.*

Sub-sec 5 of s. 2 of the Defence of India Act is merely supplementary and does not exclude the ordinary methods by which the Provincial Government's executive business was authorised to be carried on by Chapter II of Part III af the Constitution Act.

The term 'executive' is used in the broader sense, as including both a decision as to action and carrying out of such decision. Sub-sec. 2 *of s.* 49 *provides an extensible limit and not a maximum limit and the provisions of sub-sec.* 2 *of s.* 124 *affords a means of such extention.*

Sub-sec. 5 *of s* 2 *of the Defence of India Act is not the only means by which the Governor can relieve himself of strictly personal functions. It provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under s.* 49 (1) *of the Constitution Act the Governor remains responsible for the action of his subordinates taken in his name.*

Whether orders of detention involve a special responsibility of the Governor within the meaning of s. 52 (1) (*a*) *and therefore required the individual judgment of the Governor and whether individual judgment excludes the operation of s.* 49 (1)?

The Home Member is an officer subordinate to the Governor within the meaning of s. 49 (1). *I.L.R.* (1939) 2 *Cal.* 411 overuled.

Matters under R. 26 *could be dealt with by the Governor in the normal manner in which executive business of the Provincial Government is carried on under the provisions of Chapter II of Part III of the Act and in particular under the provisions of s.* 49 *and the rules of business made under s.* 59. *The orders for detention must be taken as* ex facie *regular and proper and there is a heavy burden on the detenu to displace the presumption enacted by s.* 16 (2) *of the Defence of India Act.*

Certain statements and answers regarding detention uuder R. 26 *given by the Home Member in the Bengal Legislative Assembly as affording evidence of improper procedure in individual cases before the court apart from the 'routine' order are not admissible in evidence.*

Sir Walter Moncton, K. C., W. Wallach & B. Mackenna for Applt.

D. N. Pritt, K. C. & V. K. Krishna Menon for Respts.

JUDGMENT

Lord Thankerton: This appeal is brought by leave of the Federal Court of India, from a judgment of that Court *(Spens, C. J. Varadachariar and Zafrulla Khan, JJ.) dated the 31st August, 1943, dismissing eight appeals by the Crown against orders and jndgments of a Divisional Bench of three Judges (Mitter and Sen, JJ., Khundkar, J. dissenting) of the High Court of Judicature at Fort William in Bengal, dated the 3rd June, 1943.

The orders and judgments of the High Court were made in applications under sec. 491 of the Criminal Procedure Code for directions in the nature of *Haceas Corpus* on behalf of nine persons, detained in various jails in pursuance of orders made under Rule 26 of the Defence of India Rules on various dates from 24th October, 1940, to 8th March, 1943. These orders and judgments directed the release of the applicants. Of the nine original applicants eight are called as respondents in the present appeal but their Lordships were informed that two of the respondents had been released, namely, Narendra Nath Sen Gupta, respondent No. 4, on a date before the judgment of the Federal Court, and Bijoy Singh Nahar, respondent

* (1943) M.W.N. 612 : Cr. 149

No. 2, after the judgment of the Federal Court. The remaning six respondents, with whom this appeal is now concerned, are under detention by virtue of orders made under Bengal Regulation III of 1819.

Having regard to the known and well settled principle of the English law that a discharge, under a writ of *Habeas Corpus* is final and not subject to appeal, and the importance of preserving safeguards of the liberty of the subject, their Lordships asked for arguments of counsel on the competency in the present case, of the appeals by the Crown from the High Court to the Federal Court, which might equally affect the competency of the further appeal to this Board. It is sufficient to refer to the decision of the House of Lords in *Cox* v. *Hakes* (1), where the law of England on this matter is fully dealt with.

In the present case, the appeals have proceeded under sections 205 and 208 of the Government of India Act, 1935. Section 205 provides as follows :—

205.—(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate has been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

On the application of the Crown the High Court granted certificates under section 205 (1) for leave to appeal to the Federal Court. After the decision of the Federal Court, leave was given by them under section 208 (b) to appeal to His Majesty in Council.

Their Lordships have come to the conclusion that, in view of the special terms of section 205, the appeals in the present case were competent.

In *Cox* v. *Hakes* (1) it was held that the right of appeal given by section 19 of the Judicature Act, 1873, did not include an appeal against an order of discharge made upon a writ of *Habeas Corpus*. Lord Halsbury L. C., says, "My Lords, I have insisted at some length upon the peculiarities of the procedure, because I think one cannot suppose that the Legislature intended to alter all the procedure by mere general words without any specific provision as to the practice under the writ of *Habeas Corpus* or the statutes which from time to time have regulated both its issue and its consequences. My Lords, I do not deny that the words of section 19 literally construed are sufficient to comprehend the case of an order of discharge made upon an application for discharge upon a writ of *Habeas Corpus*; but it is impossible to contend that the mere fact of a general word being used in a statute precludes all enquiry into the object of the statute or the mischief which it was intended to remedy." In their Lordships' opinion, the condition of the law of *Habeas Corpus* in India, and the purpose and express words of section 205 of the Government of India Act, 1935, afford a contrast to the condition of the English law and the object and general terms of S. 19 of the Judicature Act of 1873. The history of the matter is shortly stated by Sir George Rankin, then Chief Justice, in his admirable judgment in *Girindra Nath Banerjee* v. *Birendara Nath Pal* (2), from which the following quotation may be made (at page 749) "I proceed therefore to enquire whether according to the law in India as it now stands there is or is not power in the High Court to grant the writ of *Habeas Corpus* at common law independently of section 491 of the Criminal Procedure Code. Now in 1870 in the case of *Ameer Khan* (3), Mr. Justice Norman held that the High Court could issue the *Habeas Corpus* outside the original jurisdiction to the Superintendent of the jail at Alipore. In 1872 the Code of Criminal Procedure (Act X of 1872) was enacted which gave the right to European British subjects detained in custody whether within the limits of the High court's original jurisdiction or outside those limits to apply for an order directing the person detaining him to bring him before the High Court, in other words for an order under section 81 in the nature of *Habeas Corpus*. Section 82 provided that 'Neither the High Courts nor any Judge of such High Courts shall issue any writ of *Habeas Corpus, Main prise, Dehomine replegiando*, nor any other writ of the like nature beyond the Presidency towns.' This prohibition cannot in my opinion be confined to the case of European British subjects nor has this been contended before us. In 1875

1. (1890) 15 A.C. 506
2. (1927) 54 Cal. 727
3. (1873) 6 B.L.R. 392

the High Courts' Criminal Procedure Act (X of 1875) in the section 148 set out various purposes for which an order in the nature of *Habeas Corpus* might be made and it gave power to the High Courts to make such orders in the case of persons within the limits of their original jurisdiction. It went on to say that neither the High Court nor any Judge thereof shall hereafter issue any writ of *Habeas Corpus* for any of the above purposes. Certain particular matters were excepted, it being stated that nothing in this section applies, to a person detained under Bengal Regulation III of 1818 and certain other Regulations. But it is quite clear that for the purposes provided for by section 148, the intention was that relief should be granted under the section and recourse should not be had to the old prerogative writs . . . . The subsequent history of the matter is shortly this, that when the Code of Criminal Procedure was amended in 1882 the Acts of 1872 and 1875 were comprised in Schedule I as enactments repealed by section 2 'but not so as to restore any jurisdiction or form of procedure not existing or followed' on the 1st January, 1883 (Act X of 1882). The matter remained very much in the same position until 1923, when a right was given to everybody within the appellate jurisdiction of this court to make an application under section 491 of the present Criminal Procedure Code. The question which arises is whether for any of the purposes mentioned in what is now section 491 it is open to an applicant still to say that he will make his application independently of that section altogether for the prerogative writ of *Habeas Corpus* on the civil side of the High Court. I observe that it has been stated in certain cases that if there is to be any question of the abolition of this right then the Legislature must say so in the most specific terms. Whether that be a correct view in a matter of procedure of this kind need not be discussed, for the Legislature has used the most specific terms: and it is plain that the Legislature never intended that the courts in giving relief of this character should for any of the purposes mentioned in section 491 be at liberty to act under it or under the old procedure." In the recent case of *Mathen* v. *District Magistrate Trivandrum* (4), this judgment was approved by the Board and it was held that, in cases covered by section 491 the power to issue a common law writ of *Habeas Corpus* in British India had been taken away by legislation and the powers conferred by section 491 substituted therefor. The present applications were under section 491. Under section 404 of the Criminal Procedure Code no appeal lies from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force. There is no provision in the Code for an appeal from an order made under S. 491; there is no conviction or acquittal in such proceedings, and S. 417, which taken along with the new S. 411 A (2) enacted by S. 2 of the Amending Act of 1943 (Act XXVI of 1943) allows an appeal on behalf of the Government only from an order of acquittal is equally inapplicable. Accordingly, as regards appeal, the position under the Criminal Procedure Code as to proceedings under S. 491 is in effect the same as the position stated in *Cox* v. *Hakes* (1).

Turning again to S. 205 of the Government of India Act of 1935, their Lordships are clearly of opinion that the section relates to both the civil and criminal jurisdiction of the High Courts; the terms of sub section (2) of S. 210 appear to put this beyond doubt, and their Lordships agree with the decision of the Federal Court to this effect in *Hori Ram Singh* v. *The Crown* (5). Further, the width of the language used is striking viz. "any judgment decree or final order of a High Court" and "it shall be the duty of every High Court in British India to consider in every case." The purpose of the provision is to confer a right of appeal in every case that involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder. The object is clearly to secure uniformity of decision in every High Court by the determination of a Court superior to them all. On the most moderate view of the matter, the securing of that object is at least as important in case of *Habeas Corpus* in which such questions are very apt to arise, as in other cases. In the absence of an express exception of *Habeas Corpus* cases, and having in view the terms and purpose of the section, their Lordships are unable to limit the terms of the section by mere construction so as to exclude these cases from its operation. Accordingly S. 205 of the Act of 1935 provides one of the exceptions referred to in S. 404 of the Criminal Procedure Code.

Their Lordships are therefore of opinion that the appeals from the High Court were competent, and it follows that the appeal to His Majesty in Council was also comptent, and

4. (1939) M.W.N. 744: Cr. 108:66 I.A. 222 P.C.

5. (1939) M.W.N. 497:Cr. 69:1939 F.C.R. 159.

they will proceed to deal with the appeal on the merits.

The present applications under section 491 of the Criminal Code were filed on the 24th April, 1943, two days af er the decision of the Federal Court in *Keshav Talpade* v. *The King Emperor* (6) under which it was held reversing the decision of the Bombay High Court refusing to make an order under section 491 for release of the applicants, that Rule 26 of the Defence of India Rules was *ultra vires* and was not warranted by the Defence of India Act, 1939.

On the 28th April, 1943 the Governor-General made and promulgated Ordinance No. XIV of 1943 under section 72 of the Ninth Schedule of the Government of India Act, 1935. By section 2 of the Ordinance a new clause was substituted for clause (x) of section 2 (2) of the Defence of India Act, 1939. Section 3 of the Ordinance provided "that no order heretofore made against any person under Rule 26 of the Defence of India Rules shall bs deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under section 2 of the Defence of India Act 1939." The amendment effected by section 2 of the Ordinance removed the grounds on which the Federal Court had pronounced Rule 26 to be *ultra vires*. The terms of Rulc 26 were not altered by the Ordinance.

In the present applications, *Talpade's* case (6) was taken as binding on them by both the High Court and the Federal Gourt and the new Ordinance No. XIV was the main object of challenge by the applicants. But before this board the Crown has placed in the forefront a challenge of the correctness of the decision in *Talpade's* case (6), and success in that contention would supersede any consideration of Ordinance No. XIV. It is therefore necessary to dispose of this question first.

The material portions of section 2 of the Defence of India Act, 1939 (Act XXXV of 1939), as amended by section 2 of the Defence of India (Amendment) Act, 1940 (Act XIX of 1940) are as follows :—

"2—(1) The Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for or may empower any authority to make orders providing for all or any of the following matters, namely :—

o o o

(v) preventing the spreading without lawful authority or excuse of false reports or the prosecution of any purpose likely to cause disaffection or alarm, or to prejudice His Majesty's relations with foreign powers or with States in India or to prejudice the maintenance of peaceful conditions in the tribal areas, or to promote feelings of enmity end hatred between different classes of His Majesty's subjects;

o o o

(x) the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do, or abstain from doing anything."

The material part of Rule 26, as it has stood since 1940, is as follows :

"26.—(1) The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to prevent him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war it is necessary so to do, may make an order,

(a) . . . .
(b) directing that he be detained."

In *Talpade's Case* (6) the judgment of the Federal Court was delivered by Gwyer C.J., who first dealt with the main argument of the appellant, which had been rejected by the High Court, proceeded (at p. 206). "We therefore reject the main argument addressed to us on behalf of the appellant, and, if there were nothing more in the appeal, we should dismiss it without further discussion. There is, however, another aspect of the case, which was not argued until the court itself drew the attention of counsel to it; for it seemed to us that it was open to question whether r. 26 itself in its present form was within the rule making powers conferred by the Defence of India Act. If it is not within those powers, then it must be held void and inoperative, either in whole or in part ; and the orders made under it will be similarly open to challenge." The learned Judge then proceeded to discuss paragraphs (v) and (x) of section 2 (2) of the Act, and for reasons fully stated by him, he came to the conclusion that Rule 26

6. (1943) M.W.N. 377: Cr. 55: I.L.R. 1944 Bom. 183

was not within the powers conferred by sub-section 2, of S. 2 and (page 214) he stated, "The Legislature having set out in plain and unambiguous language in paragraph (x) the scope of the rules which may be made providing for apprehension and detention in custody it is not permissible to pray in aid the more general words in S. 2 (1) in order to justify a rule which so plainly goes beyond the limits of pragraph (x); though if paragraph (x) were not in the Act at all, perhaps different considerations might apply .... We are compelled therefore to hold that r. 26 in its present form goes beyond the rule making powers which the Legislature has thought fit to confer upon the Central Government and is for that reason invalid."

Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-sections (1) and (2) of section 2 of the Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that Rule 26 was invalid. In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule making power is conferred by sub-section (1), "the rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under, sub-section (1), the provisions of sub-section (2) are not restrictive of sub-section (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)." There can be no doubt—as the learned Judge himself appears to have thought—that the general language of sub-section (1) amply justifies the terms of Rule 26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2).

Their Lordships are therefore of opinion that *Talrade's* case (6) was wrongly decided by the Federal Court, and that Rule 26 was made in conformity with the powers conferred by sub-section (1) of section 2 of the Defence of India Act. It is accordingly, unnecessary for their Lordships to consider whether Rule 26 was not also within paragraphs (v) and (x) of sub-section (2) of S. 2, contrary to the opinion of the Federal Court and their Lordships express no opinion on the matter. As already stated, their Lordships are also relieved from any consideration of Ordinance XIV of 1943.

As regards the remaining question, counsel for the Crown stated them under two main-heads, viz., 1st whether the orders of detention can be questioned in view of the provisions of section 59 (2) of the Government of India Act and section 16 of the Defence of India Act, and 2ndly, assuming that they can be so questioned, whether there were materials on which the Courts below could properly decide that the orders were not made in conformity with Rule 26.

The order for detention of respondent No. 1, which is typical of the other cases, is as follows:—

"Calcutta, the 27th October, 1942.

"Whereas the person known as Shibnath Bannerjee, M. L. A., son of late Dwariknath Banerjee of 3/1 Kali Banerjee Lane, Howrah, is detained in the Howrah Jail under the provision in rule 129 of the Defence of India Rules;

And whereas the Governor is satisfied that, with a view to preventing the said person from acting in any manner prejudicial to the Defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the war, it is necessary to make the following orders to continue his detention:

Now, therefore, in exercise of the powers conferred by clause (*b*) of sub-rule (1) and sub-rule 5 of rule 26 of the Defence of India Rules the Governor is pleased to direct—

(*a*) that the said person shall until further orders be detained;

(*b*) that until further orders the said person shall continue to be detained in the Howrah Jail; and

(*c*) that during such detention the said person shall be subject to the conditions laid down in the Bengal Security Prisoners Rules, 1940.

By order of the Governor,
S. B. Bapat,
Addl. Dy. Secy. the Govt. of Bengal."

Except that in the case of respondent No 6, Niharendu Dutt Majumdar, there was no previous arrest under Rule 129, and that in some cases the order was signed on behalf of the Governor by "A E. Porter, Addl. Secy. to the Govt. of Bengal", there is no material difference from the above order in the case of the remaining orders.

The Crown maintained that the orders being on their face regular and in conformity with the language of the Rule, it was not open to the Court to investigate their validity any further, and relied on the statutory provision already referred to It should, however, be stated, that Rule 3 (1) of the Defence of India Rules provides that the General Clauses Act, 1897, is to apply to the interpretation of these Rules as it applies to the interpretation of a Central Act, and that, under section 4 (43a) of the General Clauses Act

"(43a) 'Provincial Government', as respects anything done or to be done by the 'Provincial Govern-

ment after the commencement of Part III of the Government of India Act, 1935, shall mean—

(a) in a Governor's Province, the Governor acting or not acting to his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the said Act . . . . . "

Section 59 (2) of the Government of India Act, on which the Crown relies, provides :

" Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor."

In the opinion of their Lordships, the contention of the Crown goes too far, as the sub-section only relates to one specified ground of challenge, namely, that the order or instrument was not made or executed by the Governor. Their Lordships agree with the statement by the learned Chief Justice of the Federal Court, viz. "It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid making of that order. In the normal case the existence of such a recital in a duly authenticated order will in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenue to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate." On this point the Federal Court was unanimously against the Crown. The other statutory provision relied on by the Crown before the Board was not, it appears, brought before the Federal Court; it was section 16 of the Defence of India Act, which provides as follows,

" 16—(1) No order made in exercise of any power conferred by or under this Act shall be called in question in any Court.

(2) Where an order purports to have been made and signed by an authority in exercise of any power conferred by or under this Act, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority."

Sub section (1) assumes that the order is made in exercise of the power, which clearly leaves it open to challenge on the ground that it was not made in conformity with the power conferred, heavily though the burden of proof may lie on the challenger, as stated by the Chief Justice in the passage just cited. Sub-section (2) raises a presumption of fact, which may be displaced, though here again the burden is likely to be heavy. S. 4 of the Indian Evidence Act provides "Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved". Accordingly, the contention of the Crown that the Court has no jurisdiction to investigate the validity of the orders fails.

On construction of Rule 26, the majority of the judges of the Federal Court held that the Governor must be personally satisfied as to the matters therein set out, and that, in view of the admission by the Crown that in none of the cases before them had the Governor himself considered the case, the order for detention were not in conformity with the Rule. They based their conclusion mainly on the power of delegation (which has admittedly not been exercised in the present case) conferred by sub-section (5) of S. 2 of the Defence of India Act, which provides as follows,

" (5) A Provincial Government may by order direct that any power or duty which by rule made under sub-section (1) is conferred or imposed on the Provincial Government, or which, being by such rule conferred or imposed on the Central Government, has been directed under sub-section (4) to be exercised or discharged by the Provincial Government, shall in such circumstances and under such conditions, if any as may be specified in the direction, be exercised or discharged by any officer or authority, not being (except in the case of a Chief Commissioner's Province) an officer or authority subordinate to the Central Government."

The learned Chief Justice disagreed, holding that sub-section (5) was merely supplementary, and afforded no ground for excluding the ordinary methods by which the Provincial Government's executive business was authorised to be carried on by Chapter II of Part III of the Government of India Act, 1935.

Their Lordships are of opinion that the learned Chief Justice was right.

It will be remembered that the definition of Provincial Government in section 3 (43a) of the General Clauses Act refers one to the provisions of the Government of India Act for the action or non-action of the Governor and this takes one to Chapter II of Part III, which is headed. "The Provincial Executive—The Governor". The material sections are as follows :

"49.—(1) The executive authority of a Province shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal or the Provincial Legislature

from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor any functions conferred by any existing Indian law on any court, judge, or officer or any local or other authority.

2. Subject to the provisions of this Act, the executive authority of each Province extends to the matters with respect to which the Legislature of the Province has power to make laws."

" 50—(1) There shall be a council of ministers to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion:

Provided that nothing in this sub-section shall be construed as preventing the Governor from exercising his individual judgment in any case where by or under this Act he is required so to do.

(2) The Governor in his discretion may preside at meetings of the council of ministers.

(3) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Act required to act in his discretion or to exercise his individual judgment, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion, or ought or ought not to have exercised his individual judgment."

" 52—(1) In the exercise of his functions the Governor shall have the following special responsibilities, that is to say:—

(a) the prevention of any grave menace to the peace or tranquility of the Province or any part thereof. . . . .

(3) If and in so far as any special responsibility of the Governor is involved, he shall, in the exercise of his functions, exercise his individual judgment as to the action to be taken."

'59.—(1) All executive action of the Government of a Province shall be exercised to be taken in the name of the Governor.

(sub-section (2), already quoted).

(3) The Governor shall make rules for the more convenient transaction of the business of the Provincial Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion.

(4) The rules shall include provisions requiring ministers and secretaries to Government to transmit to the Governor all such information with respect to the business of the Provincial Government as may be specified in the rules, or as the Governor may otherwise require to be so transmitted, and in particular requiring a minister to bring to the notice of the Governor and the appropriate secretary to bring to the notice of the minister concerned and of the Governor, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor.

(5) In the discharge of his functions under sub-sections (2), (3) and (4) of this section the Governor shall act in his discretion after consultation with his ministers."

Rules of Business have been framed by the Governor of Bengal under section 59, under which it is not disputed that questions of detention fall to be transacted in the Home Department. Under Rule 12 all orders or instruments made or executed by or on behalf of the Government of Bengal are to be expressed to be made by or by order of the Governor of Bengal, and under Rule 13 save in cases of special authorisation, every order or instrument of the Government of Bengal is to be signed by either a Secretary (an Additional Secretary), a Joint Secretary, a Deputy Secretary, an Under-Secretary, or an Assistant Secretary to the Government of Bengal, and such signatures are to be deemed to be the proper authentication of such orders or instruments.

In the first place, their Lordships observe that the provisions of Chapter II of Part III of the Act of 1935 as to the Provincial Executive and its executive authority use the term "executive" in the broader sense as including both a decision as to action and the carrying out of such decision.

Counsel for the respondents submitted a contention which the majority of the learned Judges in the Federal Court had accepted, based on sub-section (2) of section 49 of the Act of 1935, to the effect that the sub-section limited the operation of the section to matters with respect to which the Provincial Legislature has power to make laws, and that the subject matter of the Defence of India was not within those powers. The learned Judges, in confirmation of this view, referred to sub-section (2) of section 124 which provides that "an Act of the Federal Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer powers and impose duties or authorise the conferring of powers and the imposition of duties upon a Province or officers and authorities thereof." Their Lordships are unable to agree with such a narrow reading of these provisions, which would involve the necessity of the Federal Legislature making provision in each case for the executive machinery to carry out the powers and duties so imposed, instead of using the existing Provincial machinery. This view is supported by sub-section (4) of section 124, which provides *inter alia* that where an Act of the Federal Legislature, by virtue of sub section (2), confers powers and imposes duties upon a Province or officers and authorities thereof in relation to a matter with respect to which a Provincial Legislature has no power to make laws, the Federation is to pay to the Province such sum as is agreed, or determined by arbitration, in respect of any extra

costs of administration incurred by the Province in connection with exercise of those powers and duties. This appears to contemplate extra costs incurred by the existing machinery of Provincial Administration. Their Lordships construe sub-section (2) of section 49 as providing an extensible limit and not a maximum limit, and the provisions of sub-section (2) of section 124 as affording a means of such extension. But, further, their Lordships construe the incorporation of the General Clauses Act, both in the Defence of India Act, and in the Defence of India Rules, with its reference in section 3 (43a) to the provisions of Part III of the Act of 1935 as to the acting or non-acting of the Provincial Governor, as necessarily embodying the relevant provisions of Chapter II of Part III, including in particular section 49.

It is for the same reasons that their Lordships are unable to accept the respondents' contention, also agreed to by the majority Judges in the Federal Court, that the provision of sub-section (5) of section 2 of the Defence of India Act provides the only means by which the Governor can relieve himself of a strictly personal function. Their Lordships would also add, on this contention, that sub-section (5) of section 2 provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under section 49 (1) of the Act of 1935 the Governor remains responsible for the action of his subordinates taken in his name.

The respondents next contended that, assuming that section 49 did apply, this question was one which involved a special responsibility of the Governor within the meaning of section 52 (I) (*a*) of the Act of 1935, and therefore required the individual judgment of the Governor. In their Lordships' opinion, they are excluded from considering the somewhat debatable question whether the present matter does fall within head (*a*) of section 52 (1), by the provisions of section 50 (3), as the contention of the respondents is that the Governor should have exercised his individual judgment. Nor is it necessary for their Lordships to consider whether "individual judgment" excludes the operation of section 49 (1) So far as it is relevant in the present case, their Lordships are unable to accept a suggestion by counsel for the respondents that the Home Minister is not an officer subordinate to the Governor within the meaning of section 49 (1), and so far as the decision in *The King Emperor* v. *Hemendra Prasad Ghosh* (7) decides that a minister is not such an officer their Lordships are unable to agree with it. While a minister may have duties to the Legislature, the provisions of section 51 as to the appointment, payment and dismissal of ministers, and section 59 (3) and (4) of the Act of 1935, and the Business Rules made by virtue or section 59, place beyond doubt that the Home Minister is an officer subordinate to the Governor.

Their Lordships are therefore in agreement with the learned Chief Justice of the Federal Court that such matters as those which fell to be dealt with by the Governor under Rule 26 could be dealt with by him in the normal manner in which the executive business of the Provincial Government was carried on under the provisions of Chapter II of Part III of the Act of 1935, and in particular, under the provisions of section 49 and the Rules of Business made under section 59.

There remain the criticisms on the manner in which the individual cases of detention have been dealt with. The six cases with which this appeal is concerned are the cases of respondents Nos. 1,3,5,6,7 and 8. In view of the opinions already expressed by their Lordships, the orders for detention in each of these cases must be taken as *ex facie* regular and proper, and it follows, as already stated, that there is a heavy burden on the respondent to displace the presumption enacted by section 16 (2) of the Defence of India Act. The respondents were enabled to raise the question as to whether the Governor was bound to give his personal consideration to the matter, by reason of the Crown's admission that he had not in fact done so in any of these cases. They were also able to raise a question as to the so-called routine order of 1st October 1942 because of Mr. Porter's admission in his affidavit. The majority of the Federal Court held all the detention orders to be bad because of the first of these admissions, though they also deal with the routine order, and criticise adversely the whole procedure. The learned Chief Justice agreed with the majority as to the cases which were subject to the routine order, he disagreed as to the necessity for the personal satisfaction of the Governor, holding that the procedure authorised by section 49 was available to the Governor, but he held that the routine order vitiated the orders as to which it operated. One of these three cases—that of Respondent No. 2, Bijoy Singh

7. (1939) I. L. R. 2 Cal. 411

Nahar, is not before the Board, as he was released shortly after the judgment of the Federal Court. On the other hand, as regards the cases of the present respondents Nos. 3, 6, 7 and 8, he stated that he was unable to find in the evidence anything which established even a *prima facie* case that the orders under Rule 26 had been improperly made or to contradict the accuracy of the narrative of the orders. Thereby he differed from the majority of the Court as regards these cases.

The evidence before the Federal Court consisted of affidavits by the respondents, the counter affidavit by Mr. Porter, Additional Home Secretary to the Bengal Government, and certain statements and answers regarding detention under Rule 26 given by the Home Minister, Bengal, in the Bengal Legislative Assembly. In common with the Chief Justice of the Federal Court, their Lordships have been unable to find anything— apart from the routine order--in these statements and answers of the Home Minister which affords evidence of improper procedure in the individual cases before the Court, even assuming that such evidence was admissible, which, in the opinion of their Lordships, was at least open to doubt. It is the evidence of Mr. Porter that establishes the application of the routine order in some of these individual cases. Further, there is nothing in the affidavits filed by the respondents which establishes such a *prima facie* case, and they were not so founded on at the hearing before the Board. The respondents' case was founded on the statements and answers by the Home Minister, as to which their Lordships have expressed their view above, and Mr. Porter's counter affidavit, which their Lordships will now consider.

In paragraph 8 of his affidavit Mr. Porter states that on the 1st October 1942, the Home Minister directed that, on receipt of the report of arrest under Rule 129 of the Defence of India Rules together with a recommendation by the Police for detention under Rule 26 in respect of persons arrested in connection with the disturbances or suspected of being so connected, orders of detention under Rule 26 (1) (b) should at once be issued as a matter of course subject to review by Government on receipt of further details to be supplied in each case by the Intelligence Branch. That clearly meant the substitution of the recommendation by the Police in place of the satisfaction of the Governor prescribed by Rule 26, and equally rendered any order under Rule 26 in conformity with the home minister's direction, to which their Lordships have already referred as the routine order, *ab initio* void and invalid as not being in conformity with the requirements of Rule 26. Their Lordships now turn to the cases before them, to which the routine order applied, and they quote the statement of Mr. Porter with regard to the first of these two cases, that of respondent No. 1.

"10. Sibnath Banerji: He was arrested by the Police under Rule 129 of the Defence of India Rules on 20th October 1942. On 27th October, 1942, I considered the materials before me and in accordance with the general order of Government directed the issue of an order of detention under Rule 26(1)(b) of the Defence of India Rules. On receipt of fuller materials the case was later submitted for consideration of the Honourable Home Minister Bengal, from whom no order directing withdrawal or modification of the order of detention was received."

Their Lordships are unable to read Mr. Porter's statement that he had considered the materials before him as involving anything more than that he had considered the report of the arrest and the recommendation of the Police to see if there was material sufficient to justify the issue of an order under the routine order. It cannot mean that, in spite of the direction of the Home Minister in the routine order, he considered the material before him so as to satisfy himself, independently of the police recommendation, that an order under Rule 26 should be issued. That would not be in accordance with the requirement of the routine order that—the police having recommended it—the order of detention should be issued as a matter of course. Further, the inaction of the Home Minister on the later submission of the fuller materials to him could not cure the invalidity of the order of the 27th October 1942.

The case of Nanigopal Majumdar, respondent No. 5, is stated in paragraph II of Mr. Porter's affidavit, and is substantially the same as that of respondent No. I. The order in his case was issued by Mr. Porter on the 8th March 1943, and no further materials had been received at the date of the affidavit, the 24th May 1943.

Their Lordships agree with the unanimous conclusion of the Federal Court that the orders of detention in the cases of the present respondents Nos. 1 and 5 are invalid.

There remain the cases of respondents Nos. 3, 6, 7 and 8. The orders of detention in these cases were earlier in date than the routine order of the 1st October 1942, and are not affected thereby. As their Lordships have already stated, there is no evidence in these cases sufficient to rebut the presumption as to their regularity. There is only one point on

which their Lordships desire to add an observation. In paragraphs 2, 3 and 4 of his affidavit Mr. Porter states that in the cases of Debabrata Roy, present respondent No. 3 Pratul Chandra Ganguly, present respondent No. 8, and Birendra Ganguly, present respondent No. 7, he himself considered the materials supplied and, in fact, the orders of detention were signed by him. In the case of Niharendu Dutt Majumdar, present respondent No. 6, Mr. Porter, in paragraph 6 of his affidavit, does not say by whom the case was considered. The order of detention is signed by S. B. Bapat, Deputy Secretary to the Government of Bengal. This is a case typical of the application of the presumption, and if the respondents had wished to probe the matter, in case tha consideration might have been by someone not qualified as an officer subordinate to the Governor within the terms of section 49 of the Act of 1935, they should not have let the matter rest there, but proceeded either by counter affidavit or by cross examination of Mr. Porter on his affidavit. As they did not take such a course, the presumption remains undisturbed.

Accordingly, their Lordships agree with the Chief Justice of the Federal Court that the orders of detention in the cases of respondents 3, 6, 7 and 8 were valid, and the appeal of the Crown will be allowed in the case of these four respondents, Counsel for the Crown stated to their Lordships that, without prejudice to any further action under Rule 26 that the Crown may find it expedient or necessary to take, it was not intended that any further action should be taken against these four respondents under the particular orders which are before the Board in this appeal.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed as respects respondents Nos. 3, 6, 7 and 8, and the judgments and orders of the Courts below should be set aside and that it should be declared that the order of detention under Rule 26 of the Defence of India Rules in each of these cases was a valid and proper order; that in the case of respondents Nos. 1 and 5 the appeal should be dismissed and the judgments and orders of the Courts below should be affirmed. There will be no order as to costs.

Referred Trial No. 88 of 1945
(Criminal Appeal No. 309 of 1945)
July 18, 1945

MOCKETT & BELL, JJ.

Madiga Chinna Obigadu alias China Madigodu In re*

Criminal Procedure Code (V of 1898), *S.* 102 *—General investigation into a case of murder—Search—Formalities if necessary.* *Section* 102, *Cr. P. C. relates to search warrants issued under S.* 96 *or* 98, *that is to say, formal searches. When the police are not going in for the purpose of a search for any specified object but for a general investigation emergently into a case of alleged murder, there is no provison of the Code of Criminal Procedure which imposes on them the duty of searching respectable citizens or themselves before the public before commencing the search.*

Trial referred by the Court of Session of the Kurnool Division for confirmation of the sentence of death passed upon the said prisoner in case No. 6 of 1945 on 14-4-1945 and appeal by the said prisoner against the said sentence of death passed upon him in the said case.

G. Gopalaswami, for Accused.

Public Prosecutor (*V. L. Ethiraj*), for Crown.

JUDGMENT
(MOCKETT, J.)

The accused in Sessions Case No. 6 of 1945 on the file of the Court of Session of Kurnool Division was convicted and sentenced to death by the learned Sessions Judge for the murder of one Kotappa Narsi Reddi. The deceased man was the farm servant of P. Ws. 10 and 6 who are father and son. There is evidence on the record to show that there was illfeeling on the part of the accused against the family of P. W. 10. P. W. 10 had given evidence against the accused with the result that the accused had gone to prison. P. W. 6 had given evidence in another case in which the accused was not concerned but concerning which there was considerable ill-feeling on the part of the accused. It is elaborately dealt with in paragraph II of the learned Judge's Judgment. But there is no evidence of actual ill-feeling on the part of the accused against the deceased man. On the record, it is abundantly clear however that the accused did kill the deceased on that night and it may well be that in the dark he killed him mistaking him for either P. W. 6 or P. W. 10.

The facts are that P. W. 6 and the deceased were sleeping together on the family thrashing floor. P. W. 10 had already done his watch

* 1945 M.W.N. 556

and had gone back to his house which is shown on the west of the plan. In the night P. W. 6 heard the deceased man crying out and saw somebody bending over him and attacking him. P. W. 6 was sleeping on the hay stack. He jumped down and pursued the assailant who started to run away. He ran towards the gate—he describes the wicket gate in the northwest corner of the field—and there he was able to strike him with a stick which he (P. W. 6) was carrying. The assailant tried to jump over the gate but stumbled against something and fell. This enabled P. W. 6 to identify him as being the accused. There was naturally an outcry and various persons were attracted to the scene; P. W. 7 Chinna Pulla Reddi, P. W. 9, P. W. 8 and P. W. 10, P. W. 6's father. The accused ran towards the south, ran in to his house and bolted himself in. Numerous people gathered and the police came on the scene, P. W. 11 being the Police Constable. The crowd outside closed the house to prevent the accused from coming out but when he was challenged by the Constable he did come out. He was wearing a shirt and dhoti stained with blood which on examination was found to be human blood. In his house was a dagger also later found to be stained with human blood. The constable also found a crowbar M. O. 2 lying near the wicket gate and this was seized. The crowbar also was stained with human blood. The evidence of the doctor, P. W. 2 shows that there were altogether ten incised wounds on this man which might have been caused by the dagger M. O. 1 and contusions which might have been caused by the crowbar M. O. 2. It will therefore be seen that there are no circumstances lacking in this case in order to prove the guilt of this accused. There was evidence of persons who came on the spot. He was chased into his own house. There he was found with blood stained clothes and blood stained dagger. His answer to the charge is that the whole case is false; the blood stains on the clothes were his own blood and the dagger was smeard with blood by the head constable; and that all the evidence of the prosecution is due to enmity. He explains the fact that he himself showed signs of having been beaten which is consistent with evidence of P. Ws. 6 and 10 by the fact that he was beaten on the way to the Police Station.

On an appreciation of the evidence the learned Judge had not the slightest doubt that the very clear story of the prosecution was right and sentenced the accused to death. He was right beyond doubt in adopting this course. As has already been indicated it is possible that the deceased man was unfortunate on that night and that P. W. 6 or possibly P. W. 10 was fortunate. We are solely concerned with the fact that the accused has been shown to have been the murderer of the deceased man Kotappu Narsi Reddi. Consequently the conviction and sentence will be confirmed and the appeal dismissed.

We observe that the learned Judge when dealing with the evidence of the constable in paragraph 8 E of his judgment says:

"It has been elicited in his cross examination that he did not meticulously observe all the provisions of house searches in this case and that he did not search himself or the panchayatdars before going in".

That observation is founded on an answer given in cross-examination by the constable.

"I did not observe the precautions laid down in the Criminal Procedure Code for the search of the house. I did not search myself or the three other persons before we went into the house."

Neither learned counsel before us are able to tell us clearly to what provisions of the Code this question was directed and Mr. Ethiraj can only suggest that it must refer to Section 102 sub-section (3). S. 102 of course relates to search warrants issued under Section 96 or 98, that is to say, formal searches. We are not aware, in an emergency of this sort when the police are not going in for the purpose of a search for any specified object but for a general investigation, there is any provision of the Code which imposes on them the duty of searching respectable citizens or themselves before the public. Whether as a matter of convention these things may be done in order to remove any cause for subsequent criticism is another matter. But it would seem the learned judge was misled by the question of Counsel and the answer of the witness in supposing that the constable had neglected some actual provision of the Code. In the circumstances of this case it would not be very surprising that with a man recently apprehended under very clear circumstances for murder the constable should at once go in and see what were the contents of his house.

N.T.R. —— *Appeal dismissed.*

Cr. R. C. No. 434 of 1945
(Cr. R. P. No. 398 of 1945)
August 3, 1945
KUPPUSWAMI AYYAR, J.

Lebhai *aliss* Sheik Abdul Khadir
and another *In re**

Criminal Procedure Code (V of of 1898), Section 196*A—Prosecution under Section* 120*B*,

*(1945) M.W.N. 527

I.P.C. read with Rule 90B Defence of India Rules–Sanction–Defence Rule 128–Scope of.

The offence under Rule 90B of the Defence of India Rules is a cognizabe offence punishable with five years rigorous imprisonment; and therefore a prosecution for an offence under Section 120B Penal Code read with Rule 90B of the Defence of India Rules does not require sanction under Sec. 196A of the Criminal Procedure Code.

Rule' 128 of the Defence of India Rules is not exhaustive of all offences punishable under the Defence of India Rules in respect of which a police officer may arrest without a warrent.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional 1st Class Magistrate of Devakottai dated 24-5-45 and made in C. C. 77 of 1945.

V. V. Srinivasa Ayyangar, T. R. Srinivasan, K. Bhashyam & R. Desikan for Petitioners.

Public Prosecutor (V.L. Ethiraj) for Crown.

ORDER

The petitioners are accused 7 and 8 in C.C. 77 of 1945 on the file of the Additional First Class Magistrate of Devokottai. They, along with others, were prosecuted under section 120-B read with rule 90-B of the Defence of India Rules, for conspiracy to export gold from British India. The petitioners contended that the prosecution cannot be started without a sanction as required by section 196-A, Criminal Procedur Code. It runs thus:

"No court shall take cognizance of the offence of criminal conspiracy punishable under section 120 B of the Indian Penal Code. . . (2) In a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, transportation, or rigorous imprisonment for a term of two years or upwards, unless the Provincial Government or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Provincial Government, has, by order in writing, consented to the initiation of the proceedings;"

The question for consideration is whether the offence with which the petitioners have been charged is an offence in respect of which sanction has to be obtained as required by section 196-A. The petitioners' contention is that it is a non cognizable offence, and if it is not a noncognizable but a cognizable one, it is an offence in respect of which the punishment is only a fine of Rs. 1000. This contention is not accepted by the learned Public Prosecutor. His case is that it is not a non-cognizable offence, but a case of cognizable offence in respect of which the accused are liable to be punished with a sentence of five years rigorous imprisonment and that consequently no previous sanction is necessary. The offence in this case is, as already stated above, that of exporting gold from British India. Rule 90 B of the Defence of India Rules, as it originally stood, prevented the export of coins and currency notes. In March 1941, the word "gold" was added, thereby prohibiting the export of gold from British India. At the time when this was added, the punishment provided for the contravention of this rule was provided in the same rule and it was 5 years' rigorous imprisonment. Subsequently, sub rules 3 to 7 were replaced by one sub rule which is the present sub rule (3). As it stands now it runs thus:—

"The restrictions imposed by sub-rule (2) on the export of money or gold shall be deemed to have been imposed under section 19 of the Sea Customs Act. 1878 and all the provisions of that Act shall have effect accordingly:

Provided that where in respect of any contravention of this rule the Customs Collector is of opinion that the penalties provided by the said Act are inadequate, he may make a complaint to a Magistrate having jurisdiction; and the accused person shall, upon conviction, be punishable with imprisonment for a term which may extend to five years or with fine or with both and the money or gold in respect of which the offence has been committed shall be confiscated by the Central Government and delivered to the Customs Collector for disposal."

All that the amendment enabled was to give those who contravened this rule the benefit of being dealt with under the Sea Customs Act 1878. It enables the person who contravened the rule to compound; it enabled them to be made subject to a penalty instead of being prosecuted, and the penalty was to be levied by the Customs Department official, and the limit of the penalty has beed fixed at three times the value of the articles or Rs. 1000. But at the same time the Amendment retained the punishment for such offences in cases where the Collector thought that the benefits of the Sea Customs Act ought not to be given to a particular offender of a particular offence: and in this case the punishment of the Rigorous Imprisonment of 5 years on conviction was retained. It cannot therefore be said that by this amendment the sentence awardable for the offence had been reduced; nor can it be said that the person who committed this offence ceased to be liable to be sentenced to 5 year's rigorous imprisonment. If that be so, the offence is one in respect of which the offender makes himself liable to imprisonment for 5

years. In all cases in which a maximum punishment is imposed, the offender is liable to the maximum punishment, though that punishment may not be given and the discretion is in the Magistrate or Judge who is to award the sentence. Similary whether a man is to be prosecuted under this section of the Sea Customs Act is in the discretion of the Customs Collector. But that does not make it any the lesss an offence liable to be punished with 5 years' rigorons imprisonment. In this view, the offence is a cognizable one in respect of which the offender is liable to receive a sentence of 5 years' rigorous imprisonment. Consequently section 196A Criminal Procedure Code does not necessitate a previous sanction.

It is also argued for the petitioners that under Rule 128 of the Defence of India Rules only certain offences are picked out in respect of which it is stated that a police officer may arrest without a warrant. That rule had to be made because all those offences in respect of which that rule was made were non cognizable offences in respect of which the offender cannot be arrested by the police without a warrant. It cannot be taken therefore as exhaustive of all offences punishable under the Defence of India Rules in respect of which a police officer may arrest without a warrant.

The petition fails and is dismissed.

N. T. R. —— *Petition dismissed*

Cr R. C. No 44 of 1945
(Cr. R. P. No. 43 of 1945)
March 5, 1945,
HAPPELL, J.

V. Pattabhi Chetti In Re.*

Prevention of Adulteration Act (*Madras Act III of* 1918), *Section 6 A* (2)— *Reason to believe that the warranty was true.*

The petitioner had purchased two tins of butter for the purpose of some festival in his house. The butter however was not used and he sold them to a dealer giving a warranty that the butter was pure and unadulterated and that it was upto the specifications required by the Act. It was found that the warranty given by the petitioner was false.

Held, *that the petitioner may have thought that the butter would be unadulterated, but it cannot be said that he had reason to believe that it was unadulterated since he had himself no knowledge of the butter which justified him in saying that it was or was not adulterated and that therefore he was guilty of an offence under section* 6*A*(2) *of the Prevention of Adulteration Act.*

Petition under Section 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the Chief Presidency Magitrate, Egmore, Madras, dated 12th September 1944 and passed in M.C. 302 of 1944.

V. A. Rajagopala Mudaliar & S. A. Raja for Pert.

C. D. Venkataramanan, for Crown.

ORDER

The petitioner has been convicted by the Chief Presidency Magistrate of an offence punishable under sub section (2) of Section 6A of the Madras Prevention of Adultration Act and has been sentenced to pay a fine of Rs. 50 or to undergo simple imprisonment for one month in default.

There can be no doubt that the conviction is correct. The petitioner had purchased two tins of butter each 12 visses in weight for the purpose of some festival in his house. The tins of butter, however, were not used and he sold them to a dealer, P.W. 2. When he sold them—and that is the basis of the charge—he gave a warranty that the butter was pure and unadulterated and that it was upto the specifications required by the Madras Prevention of Adulteration Act. Sub-section (2) of section 6 A of the Madras Prevention of Adulteration Act provides that every person who, in respect of an article of food sold by him whether as principal or as agent, gives to the purchaser a false warranty in writing shall, unless he proves to the satisfication of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were ture, be punished with fine etc." The butter sold to P. W. 2 was found on analysis to contain 22·5% of water whereas the maximum percentage of water permitted is 20%. It is not disputed therefore that the warranty which was given by the petitioner was false. But it is argued that as he was a private person who had merely sold butter because it had turned out not to be wanted for the festival for which it was purchased and as the butter to his knowledge had been purchased from a reputable firm, he had whithin the meaning of sub-section (2) of S. 6 A reason to believe that the statements of descriptions which he gave in his warranty in writing were true. In my opinion it is not possible to accept this argument. The petitioner may have thought that the butter would be unadulterated, but it cannot be said that he had reason to believe that it was unadulterated since it is clear that he

*1945 M. W. N. 559

had himself no knowledge of the butter which justified him in saying either that it was or was not adulterated.

The conviction is therefore correct and in passing the sentence of fine only, the Chief Presidency Magistrate has taken into account the fact that in all probability the petitioner acted foolishly rather than criminally in giving the warranty which is the foundation of this case. The petition is dismissed.

N.T.R. — *Petition dismissed.*

PRIVY COUNCIL

(Appeal from Lahore)

July 10, 1945

LORD THANKERTON LORD, GODDARD, & SRI JOHN BEAUMONT

Nur Mohammed v. The King Emperor*

Criminal Procedure Code (*V of* 1898), *S.* 417 —*Powers of High Court.*

The High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed.

A. S. P. Khambhatta for Applt.

R. G. D. Roberts, K. C. & *C. Bagram*, for Crown.

JUDGMENT

Lord Thankerton: In the present appeal only one question has been raised and that, as stated in the Order granting leave, a contention that the trial court "having held there was no evidence at all on which any conviction could be based a Court of Criminal Appeal is not justified in reversing the Court of first instance by placing reliance on the very evidence which had been entirely rejected by the Court of first instance".

The Lordships were referred, rightly enough, to the decision of this Board in the case of *Sheo Swarup* v. *The King Emperor* [1], and in particular to the passage at page 404 in the judgment delivered by Lord Russell. Their Lordship do not think it necessary to read it all again but would like to observe that there really is only one principle, in the strict use of the word, laid down there; that is, that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. Then follows an expression, under four headings, of what would be the proper practice, and their Lordships think, is the proper practice, for the High Court to follow in considering whether they should reverse the decision of the Sessions Judge. At the foot of the page there is a paragraph expressing a view which is quite common in such cases, that the Board will always assume that a court has followed the proper practice unless something appears which proves the contrary.

In the present case the High Court judgement shows that they have been at pains to deal in detail with the reasons given by the Sessions Judge for disbelieving the group of witnesses, the Patwari and the other three alleged eye witnesses. They have dealt in detail with them, showing on the face of their judgment that there is no necessity to presume in this case that they have not done their duty, because on the face of the judgment they have been at pains to do so. In that view their Lordships are of opinion that there is no ground for invoking the assistance of this Board on account of any miscarriage of justice or the like matter, and that this appeal should be dismissed. Their Lordships will humbly advise His Majesty accordingly.

— *Appeal dismissed*

1. [1934] M.W.N. 1017; Cr. 193; 61 I.A. 398 P.C.

*1945 M.W.N. 560 (1)

PRIVY COUNCIL

(Appeal from Jamaica)

June 6 1945

LORD PORTER, LORD GODDARD, SIR MADHAVAN NAIR & SIR JOHN BEAUMONT

Horold White v. The King*

Criminal Trial—Murder—Confession to witness—Uncorroborated—Conviction on.

Confessions are not always true and they must be checked, more particularly in murder cases, in the light of the evidence on the record to see if they carry conviction.

It would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness who had a strong motive for implicating some one else in the murder and uncorroborated from any other source.

A. F. Gahan. for Applt.

R.S. A. Kyffin, for Crown.

JUDGEMENT

SRI JOHN BEAUMENT:—This is an appeal by special leave from the judgment of the Court of Appeal at Jamaica, dated 6th January, 1944, dismissing the appellant's appeal on his conviction before Mr. Justice Watts and a jury at Savla-Mar on the Northern Circuit, for the Parish of Westmoreland, Jamaica, on the 26th November, 1943, for the murder of Lamton Woolcock on the 2nd September 1943.

*1945 M. W. N. 560 (2)

The appellant was arraigned on indictment before Mr. Justice Watts with the murder on the 2nd September, 1943, of Lamton Woolcock in the Parish of Westmoreland. He pleaded "Not Guilty" and a jury of 12 men was sworn to try the case. The trial proceeded from the 22nd to the 26th November, 1943, when the appellant was found guilty and convicted and sentenced to death. He appealed to the Court of Appeal in Jamaica, and on the 6th January, 1944, his appeal was dismissed without any reasons being given by the Court. At the conclusion of the argument, before this Board their Lordships announced that they would humbly advise His Majesty that the appeal should be allowed and the conviction quashed, and that they would state their reasons in writing at a later date. This they proceed to do.

According to the evidence of the widow of the murdered man, he left his house in accordance with his usual custom, at about 3-30 p.m. on the 2nd September to go to a piece of land called "Confusion" on which he grew cocoanuts and kept cattle, and which was rather less than half-a mile from his house. The deceased usually returned to his home at about 5 p.m. and when he did not come on the day in question his wife went to look for him, and at about 5-45 p.m., she found his dead body lying on "Confusion". From the wounds on the body, which included 7 incised wounds, it is obvious that the man had been brutally murdered. This evidence has been accepted by both parties and makes it clear that the murder must have been committed at some time between 3-45 p.m. and 5-45 p.m., on the 2nd September.

There were found close to the body 2 machettes or cutlasses, one of which (exhibit 1) was stained with human blood and was identified as having belonged to the deceased. The other (exhibit 4) was identified by a witness —Distin—who will be referred to more particularly later, as belonging to the accused. There were also found, on the next day close to where the body lay, the husks of 26 cocoanuts of a kind similar to those grown by the deceased.

The principal witness for the Crown was one, Clifton Williams, aged about 21, apprenticed to a tailor at Sheffield, who stated that he saw the accused at about 7 p.m. on the 1st September, when the accused asked him to sell 25 cocoanuts for him. For certain reasons the accused said he would not carry the cocoanuts to Sheffield Square where Williams worked, but would carry them to the Springvale crossroads, and the two men arranged to meet there about the same time the following evening. Williams said that on the next day, about 1 p.m., he saw the accused on a track leading from Springvale to Sheffield not very far from "Confusion", and that he was running with a machette in his hand. Later that evening, that is, on the day of the murder, Williams said that he went to the place where the accused and he were to meet at about 7 p.m. and found the accused in a cemetery behind a tree. The accused told him he had brought the cocoanuts which proved to number 26 husked nuts. Williams put the cocoanuts into a basket, took them to Sheffield and sold them to Mrs. Alice Campbell for a sum of 3s. He returned with the money and handed it over to the accused who gave him 6d. and said to him, "I got in a trouble to fart, for I kill somebody." On being asked by the witness, "Who you kill man?" the accused said, "Then you nuh hear?" to which the witness replied, "Oh, Lammie" meaning the deceased, of whose death he had heard earlier that evening. The witness then said that the appellant said that he was going to have the last time with Winnie, and made a threat as to what he would do if he heard anybody say anything or ask about it.

It is necessary to notice the evidence of some other important witnesses. Amos Smith, a Police Constable, who was on duty in Sheffield Square on the 2nd September said that around 5 minutes past 3 p.m. he saw the accused at Sheffield Square wearing khaki pants and a khaki shirt. The accused left the Square and about half an hour later came back wearing white trousers and a print shirt. The accused and a witness—Winifred Barrett —have explained why the accused changed his clothes. Smith then continues: "I left him about half past four, pretty near 5 o'clock and went home." This evidence seems to suggest that the witness had seen the accused in the Square from 3-30 until the witness left at near 5 o'clock and if that evidence is true, it is clear that the accused could not have committed the murder In his summing up the learned judge told the jury that Smith said he saw the accused at half-past 3 and last saw him 4-30–5 p.m., leaving the jury to infer that during the vital period from half past 3 to 5 p.m. the accused was not seen by the witness. Their Lordships think that this is not the effect of the

evidence which does not suggest that the accused left the Square after 3-30 and whilst the witness was present. The learned judge failed to point out to the jury that Smith as a police constable was a man whose duties would require him to appreciate the importance of noting times correctly and that as a witness for the prosecution his evidence could not be lightly disregarded nor did he allude to the difficulties in the way of holding that the accused could have left the Square and committed the murder between 3-30 and 5 p m. Sheffield Square is about half-an-hour's walk from "Confusion", and it would have been necessary for the accused to get to "Confusion," to murder the deceased, collect and husk 26 cocoanuts, take them to and conceal them in, the cemetery where he is said to have met Williams later (since he could not have removed the cocoanuts after the alarm as to the murder had been given and people collected on the site), wash away the blood which the murderer must almost certainly have got on to his hands and clothes, and then return to the Square without any witness having observed him performing any one of these operations. Moreover, it would be strange if the accused, a local man, minded to steal the deceased's cocoanuts, should have effected his purpose at a time when the deceased, according to the evidence of his widow, was in the habit of being on "Confusion". If it be suggested that the theft may have taken place earlier in the day, then the difficulty arises that no reason is shown for the accused's return to "Confusion" in the afternoon when the murder must have been committed.

The next witness to notice is the detective—Woolaston. He said that he found two machettes (exhibits 1 and 4) on "Confusion", that he ask the accused if he had a machette; and he said he had but had loaned it to his cousin Volney White. The witness sent for the machette and recovered it from Volney White and that machette, which is exhibit 7, the accused claims to be his only machette. According to Woolaston it is more worn than exhibit 4. Woolaston also collected some clothes at the house of the accused and sent them to the pathologist, whose certificate stated that no human blood was found upon them. This fact is ignored by the learned judge in his charge to the jury, though there were two pools of blood by the body, and it would have been very difficult for the murderer to have avoided getting some blood on his clothes.

The next witness is Distin who identified exhibit 4 as being the machette belonging to the accused. He said that the accused had often come to his tannery with this machette, which he recognised because it had a broken handle and because it was much worn, its length being reduced. The learned judge observed that exhibit 4 had a chip on the handle. It is most unfortunate that exhibit 7 was not put to this witness. His reasons for being able to distinguish with certainty exhibit 4 as being the machette of the accused are not convincing, and he might well have hesitated if he had been asked to explain why he was certain that exhibit 7 was not the machette of the accused. In his summing up the learned judge asked the jury whether they thought Distin had come there with the deliberate object of deceiving them. This is a plain misdirection, since it is obvious that Distin may have been an honest witness who was mistaken in his identification of the machette.

The next witness to notice is Cyril Gooden, a butcher, living at Sheffield and a friend of the accused. He said that he saw the accused on the 2nd September around 4 o'clock in the Square. This corroborates Smith's evidence as to where the accused was at that time. The witness then says that he saw the accused on 3rd September at the Chinese shop which is presumably in the Square, at about 10 o'clock in the morning. The accused complained that he and Gooden were unpopular because they had handed over a man named Clifford Williams to the police and that, because of this unpopularity, a detective had searched his (the accused's) house though the accused said he had done nothing After some further conversation the witness alleged that he said to the accused: "Harold, I would like to know how soon Lammie got dead" and the accused replied, 'Really, what happen, after I kill him I sorry for him". Later that day witness again met the accused at Zada Blackwood's house where they seem to have sung a hymn which it is suggested implies that the accused was guilty of the murder. Zada Blackwood was called by the accused and she said that the accused said that they were accusing him of having killed Woolcock but that he would 'like to know or see the son of a bitch that kill Lamton."

The accused gave evidence on his own behalf. He denied the whole of the evidence of Clifton Williams and the alleged conversation with Gooden.

The evidence discussed above is the most

material in the case. The learned Judge in his summing up told the Jury that it was a case of circumstantial evidence, and he explained to them the nature of such evidence, and at the conclusion of his charge he told them that if they found any gaps in the chain of evidence placed before them then the Prosecution had failed to accomplish what it had undertaken to do, and the accused must be acquitted. But the learned Judge omitted to point out to the Jury that the so-called chain consisted almost entirely of gaps. No one saw the accused going to "Confusion" before the discovery of the murder ; no one saw him removing or husking cocoanuts on "Confusion"; no one saw him removing them to the place where he is said to have handed them over to Williams; and no one heard him threaten the deceased. The evidence of Willians, apart from the direct evidence of a confession is consistent with the accused having gone to "Confusion" on the morning of the 2nd September, stolen 26 cocoanuts and concealed them in the cemetery to be handed to Williams later in the day, and that it was on his return from such an expedition that Williams saw him at 1 p.m. Even if the accused's machette was found on "Confusion" that would not establish his presence there at the crucial time. When the evidence is analysed the case appears to rest, not on circumstantial evidence, but on the direct evidence of the confessions alleged to have been made to Clifton Williams and Gooden. Gooden's evidence as to the confession is vague and confusing. Apparently, at one and the same time the accused was complaining that he was being wrongly suspected because of local enmity, and saying that he wished to know who had committed the murder, and then that he was sorry for the man after he had killed him. The alleged confession to Clifton Williams is more detailed and is expressed in the sort of language which one might expect a man like the accused to use. But the learned judge did not point out to the jury that Williams was in a dangerous position, since he had sold cocoanuts which appear to have been stolen from the deceased's land on the day of the murder, and he therefore had a strong motive for implicating someone else in the murder. The jury should have been warned that it would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness so situated, and uncorroborated from any other source. Their Lordships would observe further that even if the statements attributed to the accused by Williams and Gooden were in fact made, they seem to be the boastings of a vain and foolish man anxious to acquire notoriety by claiming responsibility for a murder which had excited much local interest, rather than serious confessions of guilt. Neither statement explains how, why, or when the murder was committed, or mentions a single fact which would have been within the special knowledge of the murderer. The jury should have been cautioned that confessions are not always true, and that they must be checked, more particularly in a murder case, in the light of the whole of the evidence on the record in order to see if they carry conviction. The jury were given no guidance of this nature.

There is one other matter to be noticed which, indeed, Mr. Gahan in his argument on the appeal placed in the forefront of his case, and that is that questions as to his character were improperly put to the accused. Under the Jamaica Evidence Law, 1938, Chapter 468, Section 9, an accused person is a competent witness in his own defence, but sub-section (f) provides that he shall not be asked any question tending to show that he is of bad character except in circumstance which do not arise in this case. In the course of his examination Counsel for the Crown put it to the accused that he lived by stealing. This question had no relevance to the case and was apparently made in order to suggest that the accused was a man of bad character and therefore likely to be guilty of the offence charged, and the question was obviously most improper. It is to be observed, however, that the question was quite general; no objection was taken to it by Counsel for the accused, and the point does not seem to have been pressed. If apart from this matter, the evidence for the Crown had been so cogent that the Board felt that any jury would have been bound to convict, and that no injustice had been done by the putting of this improper question they might have thought it unnecessary to interfere. The Court of Appeal in Jamaica, under Section 16, sub-section 1 of the Court of Appeal Law is empowered to adopt such a course. In view, however, of the weakness of the evidence in this case it is impossible to be confident that the jury were not in any way influenced by this question. However, apart altogether from this difficulty, their Lordships are of opinion that in view of the errors and omissions in the summing up the case of the accused was never properly put to the jury

and their minds were never directed to the real issues in the case. In these circumstances their Lordships are clearly of the opinion that the conviction cannot stand, and as already stated have humbly advised His Majesty that this appeal should be allowed and the conviction and sentence quashed.

Appeal allowed.

PRIVY COUNCIL
(Appeal from Bombay)
July 3, 1945
LORD THANKERTON, LORD PORTER & SIR MADHAVAN NAIR

Ali Mahomed Adamalli
v.
The King-Emperor*

Contempt of Courts Act (*XII of* 1926) *S.* 2 (3)—*Mussulman Wakf Act* (*XLII of* 1923) *as amended by Mussulman Wakf* (*Bombay Amendment*) *Act* (*Bom. Act XVIII of* 1935) *S.* 3—*Order by Court of Small Causes to furnish information—Failure to obey—Committal for contempt—Penal Code* (*XLV of* 1860) *Ss.* 40, 43 & 176—*General Clauses Act, S.* 26.

The appellant was fined Rs. 1000 *by the High Court for contempt under the Contempt of Courts Act in failing to obey an order of the Small Causes Court of Bombay directing him to furnish a statement of particulars of wakf property under S.* 3, *Mussulman Wakf Act. On appeal to the Privy Council.*

Held, (*i*) *that the question of committal or non-committal for contempt is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be serious disregard of the principles of natural justice the Privy Council would be slow to interfere with that discretion.*

(*ii*) *In the case of an offence created by statute, procedure for punishment prescribed there is no authority for the contention that that procedure should alone be followed and committal for contempt should not be resorted to for inflicting additional or collateral punishment. Although the fact that there is another remedy available is a matter for the court to consider when exercising its discretion whether to commit or not to commit, the desirability of speed and the necessity of ensuring that the orders of the court should be obeyed are also matters of importance.*

(*iii*) *That though the failure to furnish information is an offence punishable under the provisions of the Wakf Act yet it is not an offence punishable under the Penal Code and consequently the High Court is not prohibited from dealing with it by the terms of S.* 2(3), *Contempt of Courts Act.*

(*iv*) *If sections* 40, 43 *and* 176, *Penal Code be read togeather, the result follows that one who fails to furnish information which he is legally bound to furnish is punishable under S.* 176, *that he is legally bound to furnish what is illegal for him to omit, that it is illegal for him to omit what is an offence and that an offence is what is punishable under the Code.*

(*v*) *S.* 26, *General Clauses Act, even if it applied, was no bar for the appellant being proceeded against for contempt inasmuch as the prosecution under the Wakf Act had been withdrawn.*

C. S. Rewcastle, K.C. & *S. P. Khambatta*, for Applt.

T. M. L. R. K. Handoo, for Respts.

JUDGMENT

LORD PORTER: This is an appeal by special leave from a judgment of the High Court of Bombay dated the 2nd December, 1941, by which the appellant was fined Rs. 1,000 for contempt under the Contempt of Courts Act (XII of 1926) in failing to obey an order made by the Acting Chief Judge of the Court of Small Causes at Bombay on the 4th September, 1939. The Order had directed the appellant to furnish a statement of particulars of Wakf property under Section 3 of the Mussulman Wakf Act, 1923 (Act No. XLII of 1923) as amended by the Mussulman Wakf (Bombay Amendment) Act, 1935 (Bombay Act XVIII of 1935).

Under that section it is provided that every mutawalli shall furnish to the Court within the local limits of whose jurisdiction the property of which he is mutawalli is situated a statement containing certain particulars.

By S. 5 every mutawalli is ordered to prepare and furnish to the Court to which such statement was furnished a full and true statement of accounts, containing certain prescribed particulars, within three months after the 31st March next following the date on which the statement referred to in S. 3 had been furnished.

Section 6A (1) enacts:

"Notwithstanding anything contained in s. 3 it shall be competent to the Court on failure of a mutawalli to furnish a statement as required under the said section to require the mutawalli to furnish within such time as the Court shall fix a statement containing all or any of the particulars referred to in the said section."

* 1945 M.W.N. 564

Section 6-B contains similar provisions on failure of a mutawalli to furnish a statement of accounts under S. 5.

Under the provisions of S. 6-C of the Act,—

"(1) The Court may either of its own motion or upon the application of any person claiming to have an interest in a wakf, hold an enquiry in the prescribed manner at any time to ascertain :—

(i) Whether a wakf is a wakf to which this Act applies ;

(ii) Whether any property is the property of such wakf and whether the whole or any substantial portion of the subject-matter of such wakf is situate within the local limits of the jurisdiction of the Court ; and

(iii) Who is the mutawalli of such wakf.

(4) On completion of the enquiry provided for in sub section (1) ...... the Court shall record its finding as to the matters mentioned in the said sub-section ...."

By section 6-F it is provided that—

"The entries made by the Court in the register of wakfs and the findings recorded under section 6-C shall subject to the provision of section 6-C, be final for the purposes of this Act."

And by section 6-L

"(1) There shall be constituted in each district a Wakf Committee to advise and assist the Court in all matters relating to the registration, superintendence, administration and control of wakfs".

And by section 6-M—

"(1) It shall be competent to the Court to refer at any time to the Wakf Committee or any three or more members thereof, for advice, opinion, enquiry, report or recommendation,................any matter relating to the registration, superintendence, administration and control of wakfs and in particular any matter relating to

(*a*) the conduct of a mutawalli or a trustee in the administration of a wakf or his fitness to continue as a mutawalli or a trustee.

(*b*) the settlement, cancellation or alteration of a scheme for the administration of a wakf; or

(*c*) the application of the funds of a wakf or any surplus thereof."

By section 10—

"Any person who is required by or under section 3.......... or 6 A ....to furnish a statement of particulars...........or who is required by section 5 or section 6-B to furnish a statement of accounts .... shall if he without reasonable cause, the burden of proving which shall be upon him, fails to furnish such statement .... be punishable with a fine which may extend to five hundred rupees........"

The appellant is a member of the Dawoodi Bohra Community and is alleged to be mutawalli of certain property, said to be wakf property. This property is, in fact, situate within the jurisdiction of the Court of Small Causes at Bombay.

On the 27th September, 1938 the appellant was served with a notice, dated the 19th January, 1938, issuing out of the Court of Small Causes at Bombay, requiring him to appear before the Chief Judge of the said Court to show cause, if any, why he had failed to furnish statements of particulars and accounts under Ss. 3 and 5 of the Act, respectively, in respect of this property.

The appellant resisted the notice on the ground, that the property in question was not wakf property and that he was not its mutawalli. He said that the property had been donated as a gift by his forefather to His Holiness the Mullaji Saheb in whom it was now vested.

The Chief Judge referred the matters to a Sub-Committee of the Wakf Committee for investigation and report and the Sub-Committee reported that: (A) there was no evidence that the Mullaji Saheb was connected with the property; (B) there was conclusive evidence that the property was managed by the appellant on behalf of his firm for the benefit of the Dawoodi Bohra Jamat without any interference or intervention by the Mullaji Saheb; (C) there was no recorded instance of accounts having been rendered, and balances paid over to the Mullaji Saheb; (D) the rents received from the property had been credited, and expenses incurred debited, to a special account opened in the books of the appellant's firm; and (E) there was evidence that the property had been used for charitable purposes for twenty or forty years.

The conclusion of the Sub-Committee was that the property in question was a wakf property.

On the case coming up again in the Court of Small Causes, before another Judge of that Court, the Judge by his Judgment dated the 4th September, 1939, found himself in entire agreement with the conclusion of the Sub-Committee and ordered the appellant to furnish within thirty days from the date of the judgment a statement of particulars under section 3 of the Act (in the form in Schedule D of the Wakf Rules) and a statement of accounts under section 5 of the Act (in the forms in Schedules A and B of these Rules) in respect of the property, in default of which the sanction required by section 10-B (1) would be given for his prosecution for an offence under section 10 of the Act.

The appellant refused to obey this order, and, therefore, in accordance with its terms, sanction for his prosecution was granted on the 9th October, 1939.

At his prosecution in the Court of the Presidency Magistrate, 4th Court, at Girgaum,

Bombay, the appellant pleaded "not guilty," and in a written statement denied that the Act applied to the property in question, or that he was its "mutawalli" within the meaning of that word as defined in the Act.

By this Judgment, dated the 9th August, 1941, the Magistrate found the appellant guilty and convicted him under section 10 read with section 6-A of the Act for failing to furnish a statement of particulars of the property in question and sentenced him to pay a fine of Rs. 201, or, in default, to suffer two months' simple imprisonment. The Magistrate was of opinion that as the findings of the Judge of the Court of Small Causes had been recorded under section 6-C (4) of the Act, the appellant was precluded by s. 6-F thereof, from questioning their validity.

Against his conviction and sentence, the appellant appealed to the High Court of Judicature at Bombay. His appeal was heard by a Bench consisting of Beaumont, C J. and Wadia, J. who set aside the conviction, ordered refund of the fine imposed (if paid) and remanded the case to the Magistrate for re-trial.

Beaumont, C.J. (with whose judgment Wadia, J. agreed) was of opinion that the Chief Judge of the Court of Small Causes had no jurisdiction, under section 6 M of the Act, to refer the question whether the property was or was not wakf property to the Wakf Committee, that being a matter which could be enquired into only by the Court itself under section 6 C; and that it was open to the appellant to say that he did not know that an enquiry under section 6 C was being held, or that the Judge of the Court of Small Causes would record findings in respect of matters which would be covered by an enquiry under that section. He concluded this part of his judgment by saying "On that ground we must send the matter back to the learned Magistrate to be dealt with on the basis that there has not been any recorded finding under section 6C."

The learned Chief Justice, however, added at the end of his judgment—

"There is one other matter which I desire to mention. Experience seems to show that the Dawoodi Bohra Community are very reluctant to accept this Act, and mutawallis of wakfs created by that community are reluctant to render accounts. We are not, of course, concerned with the merits of any question of that sort. All that the Court has to do is to see that the law is enforced. Now, here we have a specific order made apparently under section 6-A directing certain particulars and accounts to be delivered by the accused within a certain fixed period. That order has been disobeyed. On the face of it that seems to show that the accused has been guilty of contempt of the Court of Small Causes, and that is a matter which this Court may deal with under the Contempt of Courts Act, 1926. The matter has, of course, not been considered up to the present moment; but we propose to serve notice upon the accused and upon the Public Prosecutor to show cause why the accused should not be committed to prison, or otherwise dealt with, under the Contempt of Courts Act, for his contempt in having disobeyed, the order made by the Acting Chief Judge of the Small Cause Court on 4th September, 1939, directing him to furnish within thirty days from the date of the order a statement of particulars under section 3 (in the form in Schedule D) and a statement of accounts under section 5 (in the form of Schedules A and B) of the Mussalman Wakf Act in respect of the wakf property at Falkland Road. C. S. No. 170 of Tardeo Division."

By section 2 (1) of the Contempt of Courts Act, 1926 (XII of 1926), a High Court of Judicature in India established by Letters Patent (the High Court at Bombay was so established) has and exercises the same jurisdiction, powers and authority in accordance with the same procedure and practice, in respect of a contempt of court subordinate to it, as it has and exercises in respect of contempts of itself, except that section 2 (3) provides that no High Court shall take cognizance of a contempt of a subordinate Court, where such contempt is an offence punishable under the Indian Penal Code.

By section 3 of the said Act, save as otherwise provided by any law, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months or with a fine which may extend to Rs. 2,000 or both.

In accordance with the directions of the High Court a notice was issued out of that Court and served upon the appellant requiring him to appear and show cause why he should not be committed to prison or otherwise dealt with under the Contempt of Courts Act, 1926, for his contempt of the Court of Small Causes at Bombay caused by his disobedience to the order of that Court, dated the 4th September, 1939.

The contempt proceedings which followed came up before Beaumont, C.J. and Wadia, J. who by Judgment dated the 2nd December, 1941, found the appellant guilty of contempt of the Court of Small Causes and imposed a fine of Rs. 1,000 upon him, to be paid into Court within one week, in default of payment of which the notice to show cause was to be restored to the List.

In the course of his judgment the Chief Justice said:

"The respondent [the present Appellant] has refused and still refuses, to obey the order. His contention is that the order was wrong, because the property in respect of which it wss made is not wakf property. But if that was his contention, he cou'd have filed a suit in the High Court for a declaration to that effect and applied for a stay of the order of the Small Cause Court. He did not do that, and the order has been in force, and has been disobeyed for over two years. He also says that he understood from the direction to prosecute in default of compliance with the order, that that was the only penalty which he would incur. We have, however, offered him further time in which to comply with the order, but he says, through his Counsel quite definitely, that he does not intend to comply with the order.

"As this is the first case of the kind which has come before the Court, we do not propose to send the respondent to prison, without the option of paying a fine. But we wish to make it perfectly clear that orders of the Court are to be obeyed, and in future when the Chief Judge of the Small Cause Court makes a specific order under section 6-A of the Wakf (Amendment) Act directing accounts to be furnished within a limited time, and that order is disobeyed, this Court will not hesitate to enforce obedience to the order by sending the disobeying party to prison, where he may remain for a period not exceeding six months under the Contempt of Courts Act."

As a consequence of this Judgment, on the 10th March, 1942, the Public Prosecutor for Bombay applied to the Presidency Magistrate, 4th Court, Bombay, for leave to withdraw the charge against the appellant under section 10 read with section 6-A of the Act, which had been remitted by the High Court to the Presidency Magistrate, by its order of the 12th November, 1941.

This leave was granted and the appellant was accordingly acquitted of the charges under section 494(b) of the Criminal Procedure Code.

Against the judgment and order of the High Court, dated the 2nd December, 1941, the appellant applied to His Majesty in Council for special leave to appeal which, by an order in Council, dated the 6th August. 1942, was granted to him.

The present appeal to His Majesty in Council is accordingly against the above mentioned judgment and order of the High Court dated the 2nd December, 1941.

As to this matter, their Lordships would observe in the first place that there in still in existence and in force the order of the Court of Small Causes dated the 4th September, 1939, which has never been appealed or set aside and which the appellant has refused and neglected to obey. *Prima facie* he is, as the High Court has pointed out, in contempt.

Three objections, however, are taken to the order of the High Court.

(1) It is said that the remedy of committal for contempt of Court is arbitrary and unlimited and should be most jealously and carefully watched and should only be exercised with the greatest reluctance and the greatest anxiety, on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject.

This contention is in substance a repetition of the language of Sir George Jessel, M.R., in *Clements* v. *Erlanger* [1].

Their Lordships have no desire to lessen the standard of care and circumspection to be observed by all Courts before exercising their jurisdiction to commit for contempt, but it must be remembered that the question of committal or non-committal is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be a serious disregard of the principles of natural justice, their Lordships would be slow to interfere with that discretion.

But, indeed, it has not been contended there has been such disregard; rather it is said that the appellant could have been prosecuted and convicted under Wakf Act if proper steps had been taken to establish before the learned Magistrate that the appellant was mutawalli of wakf property, and that, in those circumstances, the arbitrary remedy of committal should not have been adopted. On this matter their Lordships agree with the observations of the learned Chief Justice already quoted as to the necessity of obedience to the orders of the Small Cause Court and do not accept the contention that the discretion of the High Court was wrongly exercised.

(2) The appellant, however, argued in the second place that the Court had no discretion in the matter. If, it was said, there is, in the case of an offence created by statute, procedure for punishment prescribed, that procedure should alone be followed and committal for contempt should not be resorted to for inflicting collateral or additional punishment. The argument was put both as a matter of right and of discretion.

As to discretion their Lordships have nothing to add to what they have already said. The contention, however, that a Court cannot commit for contempt if any other remedy exists is novel and no authority to that effect was quoted or is known to their Lordships.

1. [1876] 46 L.J. Ch. 375 (381, 382)

The argument presented in the past to the Court, when a question of this kind has arisen, has been, not that the existence of another remedy precludes the application of the remedy of attachment but that if there be two remedies, one by indictment and the other by committal for contempt, the former ought to prevail inasmuch as it is more desirable that these matters should be determined by a jury than by the Court summarily. Such an argument was presented in *R.* v. *Almon* [2], but did not prevail. No doubt the fact that there is another remedy available is a matter for the Court to consider when exercising its discretion whether to commit or not to commit, but, on the other hand, the desirability of speed and the necessity of ensuring that the orders of the Court should be obeyed are also matters of importance. The Court may, therefore, consider that after two years of disobedience a heavier fine than that permitted by the Wakf Act should be imposed, or in a proper case that imprisonment should be awarded.

An argument was at one time presented to their Lordships based upon Section 26 of the General Clauses Act which runs as follows :—

"When an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

Having regard to their Lordships' view it is not necessary for them to decide whether the section applies or not. If it did their Lordships would point out that inasmuch as the prosecution has now been withdrawn the appellant will suffer only one punishment viz., a fine for his contempt and will not be punished twice.

Finally, it was said that by reason of the provisions of the Contempt of Courts Act, 1926 (Act No. XII of 1926), the High Court had no jurisdiction to punish contempts of the orders of the Court of Small Causes

Section 2 (1) of that Act provides that—

"Subject to the provisions of sub-section (3) the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority in accordance with the same procedure and practice in respect of contempts of courts subordinate to them as they have and exercise in respect of contempts of themselves."

This sub-section would if it stood alone give the High Court the authority required, but it is qualified by the terms of sub-section (3) which is said to take away the jurisdiction of the High Court in the present case.

2. [1765] Wilm 243

Sub section (3) reads as follows :—

"No High Court shall take cognisance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code."

The appellant relied upon this sub-section and contended that the contempt of which he was found guilty was an offence punishable under the Indian Penal Code. He maintained therefore that the High Court had no cognizance of it.

To this contention two answers were made, (I) It was that upon its true construction the sub-section only prohibited the High Court from dealing with offences punishable under the Code as contempt and that there is no provision in the Code making this particular offence punishable as contempt. The view that sub-section (3) has reference only to cases where the Indian Penal Code empowers the Court to punish for contempt as contempt appears to have commended itself to some of the Courts of India (see *Kaulashi* v. *King-Emperor* [3]. and *Jnanendra Prasad Bose* v. *Gopal Prasad Sen* [4].

Having regard to their Lordships' view that the contention that the contempt of which he was found guilty was an offence punishable under the Indian Penal Code is unsound for the reasons hereafter given, their Lordships do not find it necessary to determine this matter. (2) Secondly, however, it was maintained that the appellant had not committed an offence punishable under the Indian Penal Code. That he had committed an offence against the Mussalman Wakf Act was admitted, but it was said that that is not enough; to take away the High Court's powers some offence against the provision of the Indian Penal Code must be relied upon and none had been established.

The argument was put in this way:—The only section of the Indian Penal Code which could be prayed in aid as creating a crime of which this appellant might be guilty is section 176 which so far as is material runs as follows:

"Whoever *being legally bound* to furnish information on any subject to any public servant as such intentionally omits to furnish such information in the manner and at the time required by law shall be punished with imprisonment or fine."

Italics are used to stress the words to which in their Lordships' view attention must in particular be directed.

3. [1932] I.L.R. 12 Pat. 1
4. [1932] I.L R. 12 Pat. 172

It is common ground (1) that there is in existence a valid order of the Court of Small Causes ordering the appellant to furnish information;

(2) that the order directs that the information be given to the Court;

(3) that a Judge of the Court is authorised to receive it and is a public servant to whom the information is to be given as such; and

(4) that the appellant has intentionally omitted to furnish it.

But the question still remains was he legally bound to furnish it within the meaning which those words bear in the Code. The expression has been defined in s. 43 of the Act in these words:—

> "The word 'illegal' is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action, and a person is said to be 'legally bound to do' whatever it is illegal to him to omit."

According to this definition the appellant is only legally bound to do what it is illegal for him to omit and it is only illegal for him to omit what is an offence or prohibited by law or is ground for a civil action.

The furnishing of the information required is not prohibited by law—it is enjoined by law—nor does its omission furnish ground for a civil action. Is it then an "offence"?

It is do doubt an "offence" if that word be used in its ordinary meaning, but "offence", like "legally bound to do" has a technical meaning in the Code. It is defined in section 40 which says:—"Offence denotes a thing made punishable by this Code". It follows that an act of omission is not an "offence" as that word is used in the Code if it is punishable only under some other enactment.

If then ss. 40, 43 and 176 be read together, the result follows that one who fails to furnish information which he is legally bound to furnish is punishable under s. 176, that he is legally bound to furnish what it is illegal for him to omit, that it is illegal for him to omit what is an offence and that an offence is what is punishable under the Code.

The only conclusion therefore to be derived from this language appears to be that what is punishable under the Code is punishable under s. 176 of the Code. The statement is no doubt true but it is not of much assistance in ascertaining what is punishable under the Code. To answer that enquiry one must look elsewhere than to s. 176 and if no other section of the Code deals with the matter, then one must conclude that the particular crime may be punishable under some other enactment but it is not punishable under the Code.

It follows in the present instance that though the failure to furnish information is an offence under the provisions of the Wakf Act yet it is not an offence punishable under the Indian Penal Code. Consequently the High Court is not prohibited from dealing with it by the terms of section 2 (3) of the Contempt of Courts Act.

This conclusion disposes of the last arguments presented to their Lordships against the jurisdiction of the High Court to commit for contempt in this case, and as in their Lordships' opinion the other contentions put forward on the appellant's behalf fail also their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

—— *Appeal dismissed.*

S. A. No. 394 of 1943

July 10, 1945

CHANDRASEKHARA AIYAR, J.

Kolimi Mahabub Sahib and others*

v.

Sri Sidheswaraswami temple at Devalampeta and others

Highway—Right of Hindus to take out processions with music in front of mosque—Undertaking by Muhammadans at time of construction of mosque not to object—Validity of—Penal Code (XLV of 1860), Section 296—Offence under—Ingredients.

In or about 1904 permission was given to the Muhammadans of a village to construct a mosque on a particular site on the undertaking given by all the then Muhammadan residents of the place that there shall be no obstruction raised by them to music being played on the high road in connection with private or temple processions. It was argued that the undertaking was not binding against the Muhammadan community and that music before the mosque would disturb Muslim congregational worship in the mosque, which was an offence under section 296, Penal Code.

Held, (*1*) *that the undertaking was valid and enforceable*; (*2*) *that the playing of music by itself near a mosque without anything further, would not amount to an offence within the meaning of section 296 of the Indian Penal Code. Any deliberate intention to disturb the worship may not be necessary, but it must be found as a fact before the section could apply that there*

* 1945 M. W. N. 569

was a substantial and not merely fanciful disturbance of the worship.

Appeal against the decree of the Court of the Subordinate Judge of Chittoor in A. S. No. 22 of 1942. (A. S. No. 62 of 1942 District Court, Chittoor) preferred against the decree of the Court of the District Munsif of Madanapallee in O. S. No. 291 of 1940.

B. Pocker & A. M. Allapichai, for Applt.

A. Bhujangh Rao & D. R. Krishna Rao, for Respts.

JUDGMENT

Defendants 26 onwards, who are the Muhammadan residents of a village called Kalakada in the Chittoor District, are the appellants in this second appeal. The suit is a representative one by the Hindu residents of the village for a declaration of their right to pass along the bit of the Chittoor-Cuddappah trunkroad in Kalakada village in procession to the accompaniment of music notwithstanding the existence of a mosque on that road. The District Munsif gave the plaintiffs a decree declaring their right, subject however to three conditions: (1) that the processions do not obstruct the lawful user of the highway by other members of the public; (2) that the processions are subject to all lawful orders passed by the Magistrate and the Police; and (3) that musical accompaniments of the processions should stop playing, within the limits of one chain on either side of the compound walls of the suit-mosque at the five times of public congregational prayers in the mosque. He also declared the right of the Hindus to play music in their private residences subject to the law relating to nuisance against which a member of the public can get relief in Courts. On appeal, the Subordinate Judge deleted the third condition above mentioned. This second appeal is directed against this declaration.

In support of his argument, Mr. Pocker has placed very strong reliance on the decision in *Rangiah Chetti* v. *Khaji Syed Hassumiah* [1] as supporting the propriety of such a condition as that imposed by the District Munsif. But for one distinguishing feature, which I believe to be a conclusive circumstance against the appellants, I would have reimposed the condition, following the decision cited. The feature is this. This particular mosque is not the ancient mosque in the village. It is a new mosque that came into existence somewhere about 1904 or 1905, and permission was given to the Muhammadans of the village, who wanted to have this mosque erected, to construct it on a particular site, despite objections raised by the Hindus and on the undertaking given by all the then Muhammadan residents of the place that there shall be no obstruction raised by them to music being played on the High Road in connection with private or temple processions. The actual words used in Ex. P-4 are these:

> "Because of the Masjid we shall raise no obstruction to melam or music of any kind in Hindu houses or in connection with temple processions going and coming along the High Road. There will be no objection from us or from our co-religionists to members of other religions and faiths going along the way accompanied by music at any time."

It is rightly pointed out by the Subordinate Judge that the mosque or masjid was allowed to be built on this undertaking and that the rights of the public which were intended to be preserved by Ex. P-4 must be upheld even now. Troubles started only in 1939 when objection seems to have been raised for the first time by the Muslims to Hindu processions with music.

Mr. Pocker urged that Ex. P-4 is not binding against the Muhammadan Community, especially when the grantees are not the residents of the place but Muhammadans in general wherever they may reside. He argued that it was not open to a few Muhammadans, however influential, or even to all the Muhammadan residents of a particular place or locality to enter into an arrangement of this kind; which would mean the offering of a premium to members of other religions to disturb Muslim congregational worship in mosques. He also pointed out that such a disturbance is an offence under s. 296 of the Indian Penal Code. In connection with this argument he referred to the agreement, Ex. D-1, dated 22-1-1939 by the Hindus of the village in favour of the Muhammadans, under which it was arranged that music should stop near the mosque at specified places.

To accept the first portion of this argument would be to hold that, in a case where a mosque is concerned, there can never be any such agreement given by any Muslim or Muslims at any time capable of enforcement, as it would always be open to persons who were not actually parties to the agreement to come up and say that they are not bound, even though it may be that all the inhabitants of the locality of the same faith agreed to a particular course. Such an extreme contention is obviously untenable. I am not prepared to assent to the broad proposition that the playing of music near a mosque would by itself, without anything further, amount to an

1. (1938) M.W.N. 119

offence within the meaning of S. 296 of the Indian Penal Code. Any deliberate intention to disturb the worship may not be necessary, but surely it must be found as a fact before the section could apply that there was a substantial and not merely fanciful disturbance of the worship. I do not think that the learned Judges who decided *Rangiah Chetty* v. *Khaji Syed Hassumiah* (1), intended to lay down any such broad proposition as contended for by Mr. Pocker.

The latter part of the argument based on Ex. D-1 would have had force but for the circumstances under which it has been found it came into existence. The District Munsif who deals with it in paragraph 21 states that he was not prepared to attach any significance or importance to it because it was influenced by election factions and it was a case of some of the Hindus, who identified themselves with Muslim parties in connection with the election to the village Panchayat Court having executed an agreement at the request of the Muslims and to oblige them. But for this infirmity, I would have held this agreement binding on the Hindus of the locality.

There were good grounds for the Subordinate Judge removing the third condition. The mosque is a recent one comparatively speaking, and it has been found by both the Courts below that till 1939 or 1940 the mamool or the practice has been for processions being taken along the road with music, in accordance with the undertaking originally given when the mosque was allowed to be built. If taking advantage of this right declared in their favour, any Hindu or group of Hindus disturb public congregational prayers going on in the mosque by the adoption of obnoxious methods such as employment of instruments devised for causing trouble and annoyance, or by playing incessant music in or around the mosque or by needless or new processions started for the purpose of splitting their Muslim brothers, they can always be brought to book by being prosecuted. If any breach of the peace is apprehended the Police and the Magistrate can always issue orders for its prevention and any declaration by the Court of the right of the Hindus will be subject to those orders, as provided for in the decrees of the lower Courts.

In the circumstances of this case the Muslim appellants cannot ask for more and the second appeal is dismissed with costs.

Leave to appeal is refused.

N.T.R. —— *Appeal dismissed.*

Cr. App. No. 162 of 1945

August 22, 1945

KUPPUSWAMI AYYAR, J.

T. S. Chokkalingam, In re*

Newspaper Control Order, 1942 — Clause 5 (1)— Offence under--Effect of repeal and supersession by Newspaper Control Order, 1944—General Clauses Act (X of 1887), Section 6.

The appellant contravened the provisions of the Newspaper Control Order, 1942 and was guilty of an offence punishable under section 5 (1) of that Order. The prosecution was laid on 28th October, 1944. By that time the Newspaper Control Order of 1942 had been superseded and a new order had been promulgated under which the Act of the appellant would not constitute an offence. In the Order of 1944 which superseded the old Order, there was no express saving clause as regards the offences already committed under the repealed Order.

Held, *that in the absence of any provision in the Newspaper Control Order of 1944 in respect of acts which are offences under the superseded Order and which have become offences liable to be proceeded against, the offender could be proceeded against and punished as if the old Order had been in force in respect of those particular offences.*

The question whether a particular act amounts to an offence or not is a matter to be considered with reference to the substantive law on the date on which the offence is committed.

Though the General Clauses Act does not apply as such, it can be looked into as a rule of prudence in dealing with the question of interpretation of the kind raised.

Appeal against the order of the Court of the Chief Presidency Magistrate, Egmore, Madras, in C. C. No. 2684 of the Calendar for 1945.

N. Rajagopalan and N. S. Krishnaswamy Ayyangar for Applt.

Crown Prosecutor (*P. Govinda Menon*) for the Crown.

JUDGMENT

The appellant is the editor, printer and publisher of the Vernacular daily paper "Dinasari". He has been convicted by the Chief Presidency Magistrate, Egmore, for offences punishable under clause 5 (1) of the Newspaper Control Order, 1942, on the ground that he had published during the

* 1945 M.W.N. 571.

weeks ending 25—6—1944 and 2—7—1944 newsprint covering 28 and 32 pages respectively, in violation of clause (1) of the said Newspaper Control Order limiting the number of pages to be published in a week to 26, and sentenced to pay a fine of Rs. 200 on each count.

There are no disputes about the facts of this case; but what was contended was that no prosecution can lie under the Newspaper Control Order of 1942 as it was superseded by the Newspaper Control Order of 1944, which came into force on 17—7—1944 which contained no provision similar to clause (5) (1) of the earlier order, and that on the date on which he was prosecuted there was no law in the statute book under which he had committed any offence in respect of the acts complained of. In short, the argument was that even though it was an offence under the Order as it stood on the date on which the publications were made, still by reason of the fact that the law which he is said to have contravened was superseded and ceased to be the law on the date on which he was prosecuted he could not be held to be guilty of any offence.

The question as to whether an offence was committed or not depends on the state of the law when the offence was committed and not on the law as it is on the date on which the prosecution is started. In the case of penal provisions, a person who commits an offence becomes liable the moment the offence is committed. But what is urged for the appellant is that this interpretation of the law is incorrect and that the provisions of the General Clauses Act do not apply to the interpretation of this Order. It is true that under rule 3 of the Defence of India Rules the General Clauses Act of 1887 shall apply to the interpretation of those rules so far as it applies to the interpretation of a Central Act. Now the rules to which they are said to apply are the Defence of India Rules, whereas the Newspaper Control Order is not a rule made under the Defence of India Act. But then even if the General Clauses Act shall not apply to the interpretation of the Newspaper Control Order by reason of section 3 of the Defence of India Rules, still the General Clauses Act could be looked into as a rule of prudence in the interpretation of these rules. My attention has not been drawn to any provision of law governing the interpretation of the Newspaper Control Order. In the absence of any legislative enactment, Courts have to apply principles of equity and good conscience analogous to the principles of the General Clauses Act. The printing and publishing of newspaper during the weeks ending 25—6—1944 and 2—7—1944 containing 28 and 32 pages respectively became an offence at the end of each of those two weeks when the newspapers were published with the number of pages mentioned above. There can be no doubt that the appellant was guilty of having committed offences under the Newspaper Control Order of 1942 on those dates.

The prosecution in this case was laid only on 28—10—1944. By that time the Newspaper Control Order of 1942 had been superseded and a new Order had been promulgated under which the Act of the appellant would not constitute an offence. In the order of 1944 which superseded the old Order, there is no express saving clause as regards the offences already committed under the previous Order which was repealed. The question for consideration is whether by the supersession of the old Order by the new one containing no provision as regards acts done prior to the passing of the new Order, in respect of which offences had been committed under the old Order, no prosecution could be laid in respect of those acts. The question whether a particular act amounts to an offence or not is a matter to be considered with reference to the substantive law on the date on which the offence was committed. The question for consideration is, where an offence was committed under an Act which is superseded and which is not an offence under the superseding Act, the offender ceases to be liable to be prosecuted by reason of the repealing of the previous Act, when there is no saving clause in the subsequent Act with reference to offences already committed.

Section 6 of the General Clauses Act provides as follows:

> "Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not ...... (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation has not been passed."

As already stated above, the provisions of the General Clauses Act though they do not apply as such, can be looked into as a rule of prudence, in dealing with question of interpretation of the kind raised by the defence in

the case. The Newspaper Control Order of 1944 is no doubt a superseding order. It does not contain any provision that there shall be no prosecution for offences already committed under the Order which was superseded; nor has the superseding Order made any provision in respect of such offences already committed under the Order which was superseded.

In *Behoarilal* v. *Emperor* [1] the question as to what were the rules governing the interpretation of a Letters Patent which was not a statute was discussed, and it was pointed out that though the Letters Patent is not an Act it should be construed in the same way as an Act and that even if the Interpretation Act did not apply in terms to the Letters Patent, the principles underlying the Interpretation Act should be applied in construing the Letters Patent. The principle enunciated in the above case could be applied to the facts of this case, and applying the same, I find that in the absence of any provision in the Newspaper Control Order of 1944 in respect of acts which are offences under the superseded Order and which have become offences liable to be proceeded against the offender could be proceeded against and punished as if the old Order had been in force in respect of those particular offences. In the view taken by me, it is unnecessary to refer to the other cases cited before me. If the principles under the General Clauses Act shall apply as a general rule of law, the Magistrate was justified in having convicted the appellant inasmuch as the offences were completed the moment they were committed and the mere fact that in the superseding Act this was not made an offence would not help the accused. I therefore confirm the convictions.

With regard to the sentence, I think it is excessive. By printing some more pages than what he ought to, he has given more to his subscribers than what he he had to, and he was the loser by that act. Also it was only under a mistaken impression that a week must be counted only as six days he seems to have published a few more pages than he ought to. The very fact that in the superseding enactment it is not thought necessary to put any limit on the number of pages to be printed goes to show that this is only a technical offence. This is not a case for imposing such a severe sentence. Further it is long after the offence was committed that this prosecution was started. This is not the only paper that committed this error. Other papers have also published similarly, taking a a week to be six days. In these circumstances, a nominal sentence will meet the ends of justice. I therefore reduce the sentence to a fine of Re. 1 in respect of each count.

N.T.R. —— *Sentence reduced.*

1. (1943) A.I.R. Cal. 285

PRIVY COUNCIL

(Appeal from Supreme Court of Jamaica)

November 13, 1944

LORD RUSSELL OF KILLOWEN, LORD PORTER, LORD SIMONDS, LORD GODDARD & SIR MADHAVAN NAIR

Daniel Youth v. The King*

Criminal Trial—Joint trial of husband and wife—Statement by wife – Admissibility.

Where there is evidence against an accused on which the jury are entitled to convict, its strength is not a matter for the Privy Council to determine. The jury are the sole judges unless some step has been taken which is contrary to natural justice or some grave and substantial injustice has been done.

A statement outside the witness-box is obviously inadmissible against anyone except the person making it.

In all joint trials the mind of the jury may be influenced by the reception of evidence which is only admissible against one of the accused, but the practice (in England) has always been in a joint trial to admit such evidence, leaving it to the presiding judge to warn the jury that the evidence must not be used to strengthen the case against or lead to the conviction of the prisoner against whom it is not admissible.

C. R. Blanco White, K. C. & S. Harris Walker, for Applt.

K. Freedy, for Respt.

JUDGMENT

Lord Porter: Their Lordships have already indicated that they would humbly advise His Majesty that this appeal should be dismissed and that they would give their reasons for tendering such advice in due course. Those reasons are set out below.

*1945 M.W.N. 610

The appellant and his wife Amelia Youth were jointly charged on indictment in the Supreme Court of Turks and Caicos Islands before His Honour S. T. B. Sanguinetti and a jury of twelve with the murder of one Poland Smith in the parish of Saint George at the Bight of Clue Hills. Both pleaded not guilty but were convicted and sentenced to death : the wife's sentence however was afterwards commuted to penal servitude for life. The husband alone appealed first to the Supreme Court of Judicature of Jamaica and subsequently by special leave to His Majesty in Council.

The appellant lived in a small settlement on Caicos Island called Thomas Stubbs Settlement which appears to have consisted of only three houses : one inhabited by the appellant and his wife, the next by the deceased man, his wife and family, and the third by the dead man's mother-in-law.

There was ample evidence of bad blood between the appellant and the deceased and indeed that the appellant threatened to get him out of the Settlement and had been heard to say with reference to him "Something is going to happen serious."

Some miles to the west of this Settlement lies another and larger settlement known as Bight Settlement, a road or path joins the two settlements, and from this road a track leads to the seashore which is about half to two-thirds of a mile distant.

The dead man was accustomed to pay a visit each Sunday afternoon to friends at the Bight Settlement and on Sunday, July the 5th 1942, as usual he left his house about 5 o'clock and visited one James Pratt, who lived two or three miles away. He arrived about 6 p.m., left about 10 p.m., but never reached his home.

On Tuesday the 7th July, 1942, his dead body was found floating in the sea some distance to the west of the Bight Settlement. Death apparently was not due to drowning but to a combination of injuries which had been inflicted upon him : they consisted of three scalp wounds towards the back of the head, a jagged wound below the left ear and a cut through the right side of the lower jaw penetrating through the inferior maxilla. Though the last mentioned wound would cause profuse bleeding, the blood would not necessarily be on the assailant.

Later the same day at a spot lying just off the track mentioned above a sandy clearing was found blood-stained and trampled and marked by footprints. The clearing was about one mile from Thomas Stubbs Settlement and 21 chains from the shore.

The bloodstains continued for about 200 yards to the beach and on the beach were found two sets of footprints as if two persons walked face to face sideways to the sea. The two sets were about two feet apart heavily indented, as if a weight was being carried and between them at one spot was a collection of blood. One set was larger than the other. According to the evidence the appellant and his wife left home a long time after the dead man, walking in the direction which he had taken towards the Bight Settlement. At sunrise the following morning Amelia Youth was seen coming from the direction in which she and her husband had gone the previous evening and shortly afterwards the appellant came from the same direction towards his house. That same morning a farmer living at Bight Settlement saw two persons coming eastwards along the beach about 4 a.m. After they saw him the two turned back in the direction of Stubbs Settlement, but he was unable to identify who they were.

On the same day there was found on the floor of the Youths' house a machette without a handle which could have caused the wound on the right hand side of the dead man's face, but no blood was in fact found on it.

The two accused were seen by the police about 3 p.m. on the 7th July and the appellant then had a bruise over his left cheek, scratches on his throat, and a dark stain on his shirt. The stain was not from blood and is immaterial. The explanation given by the appellant, and his wife as to the other injuries was that they had had a quarrel the night before in the course of which he had struck his face against the room door and she had scratched him. After this interview the appellant who was wearing an old blue shirt and pants, asked leave to go home to change his clothes and started on his way but was called back and thereupon ran away and hid himself. He was subsequently arrested the same day, but again escaped and was finally re-arrested on the 11th July. Meanwhile his wife was arrested and kept in custody.

Later on, viz., on the 22nd July, in consequence of certain information which had been received one of the local constables and a clerk went to the Youths' house and searched in a field about 40 feet beyond a wall which stood east of the house, and was itself 15 to 20 feet from the house. The appellant used this field for planting corn, potatoes, and such like purposes and in it the constable

found a clump of dry bush which had apparently been gathered together and upon which a few small stones had been placed. Underneath he found two cave holes going down vertically into the rock and in them were two sticks or clubs. The larger one had upon it diffused stains of human blood. The smaller was also smeared with blood, but it was impossible to say whether this blood was or was not human blood as the quantity found was too small to enable a conclusion to be reached. Either of the two sticks might have caused the injury at the back of the head inasmuch as the wounds found on the deceased man, except that which cut through the jaw, must have been caused by a blunt instrument or by the head coming in contact with a hard surface, e.g., stone or wood.

The matters set out above constitute the evidence admissible against the appellant. The information however which led to the discovery of the sticks or clubs came from the female accused and is contained in the statement set out below: —

"On Saturday 4th July 1942 I and my husband Daniel Youth who is commonly called General had a little a fight, and he knocked his face just above his eyes on the side of the house; all these scratches that he has on his face now were not there on Saturday.

My husband did not sleep home on Sunday night 5th July 1942, he went out just about sunset, and he never come home untill Monday morning. About 10 a.m. my husband on Monday morning left to go for conchs, and he returned home at or about 1 o'clock. My husband then said to me you see Poland home? I said to him I am not looking out for Poland. He replied to me you wont see that damn bitch back in Thomas Stubbs, he said I done murder his ass out last night and dragged him in the sea. I did not believe him at first so he went to eastward and brought a lignumvitae stick as big stick full up with blood and he said this is the stick that I killed him with. I said to him General you should not have killed Poland out like that and he said to me you aint glad, that damn bitch out of Thomas Stubbs so you can live in peace and he tell me if I talk it he was going to carry me cross to northward and kill me and put me in the hole he said just how he murdered Poland he would murder me the same way. The same day when we heard that Poland Smith was murdered he sent Rosina my sister in the field to get some corn and while she was gone he tell me dont mind what James Pratt and them tell me. I must tell them nothing because if I do he will still kill me how he tell me before. He carried the stick in the cave hole to eastward of the house in the field.

Sunday night he had on one short old pair of oznaburg pants and one old blue shirt and waistcoat. He told me he lay way for Poland down in the road and the first stroke he gave him was on his head to knock all his senses away from him.

I am telling you how to get the stick its on the east side of my house in the banana bottom some potato slips and then there are some rocks and near that is the cave hole. Sgd (Amilia Youth)."

The same advocate had been assigned to defend both prisoners. They were jointly charged and jointly tried. No application was made that their trials might be separated. When, however, the statement was tendered in evidence it was objected to by defending counsel, the grounds of objection being that persons whether under arrest or not should not have statements elicited from them. This objection was overruled by the presiding judge, but the jury were warned with the greatest care both then and subsequently and in the summing up that this statement was not evidence against the husband and must not be taken into consideration in determining his guilt or innocence.

Neither of the accused elected to give evidence and both were found guilty of murder. Daniel Youth alone appealed to the Supreme Court of Jamaica, his contention being that the statement was inadmissible against him and whatever warning may have been given it must have so influenced the minds of the jury as to have made his trial unfair.

His appeal was dismissed on the 30th May, 1943, on the ground that the statement *was* admissible for and against the wife and that the jury had been warned that they were on no account to take the statement as evidence against the husband.

Their Lordships find themselves in agreement with the Supreme Court. There was evidence against the appellant on which the jury were entitled to convict. Its strength is not a matter for their Lordships to determine; the jury are sole judges unless some step has been taken which is contrary to natural justice or some grave and substancial injustice has been done.

In the present case it is said that the admission of the statement must necessarily have so influenced the mind of the jury that the appellant has been deprived of the substance of a fair trial.

Their Lordships would point out the statement was evidence which might be regarded either as favourable or unfavourable to Amelia Youth and as such it was imperative for the prosecution to put it in evidence. It is true no doubt that in all joint trials the mind of the jury *may* be influenced by the reception of evidence which is only admissible against one of the accused, but the practice in this country has always been in a joint trial to

admit such evidence, leaving it to the presiding judge to warn the jury that the evidence must not be used to strengthen the case against or lead to the conviction of a prisoner against whom it is not admissible.

In truth the real complaint in the present case is that the prisoners were tried jointly and not separately—the submission being that they sould have been tried separately and the husband's case taken first.

The question of joint or several trials however has always been left to the discretion of the presiding judge. The discretion must of course be a judicial one, but here their Lordships would point out that no application was made to sever the trials nor in their view would it have been possible to override the judge's discretion had he been asked to try the prisoners separately and refused to do so. Much less would it have been possible to interfere where such request was not made.

So far their Lordships have been dealing with the matter as if no specific provisions were in force which had a bearing upon it.

The provisions, however, of the Evidence Ordinance No. 3 of 1901 of the Revised Laws of the Turks and Caicos Islands, 1909 are relevant to its consideration. Two of those provisions must be quoted, and are as follows:—

"XCIX. In all criminal proceedings the accused, and the husband or wife of the accused, as the case may be, may be called as a witness; but subject to the following provisions:—

"(i) the accused shall not be called as a witness without his consent;

"(ii) the wife or husband of the accused shall not be called as a witness without the consent of the accused, except in any case in which the wife or husband might have been compelled to give evidence before the commencement of this ordinance.

* * *

"CII. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other, and except in the cases mentioned in Sections XCIX and C.'

The appellant relied upon these sections, and in particular on sect. CII, as precluding the giving in evidence of the statement of Amelia Youth in the present proceedings.

As to XCIX, it was said that the statement became evidence when it was put in, and could not be put in without the husband's consent; and as to CII, it was said that the statement contained a communication made by the husband and was therefore inadmissible since no consent had been given.

Their Lordships do not find themselves able to accept these arguments. Both sections appear in a group of provisions entitled "Production and Effect of Evidence", and under the subheading "Witnesses."

From these headings it would appear that the sections deal and deal only with witnesses called to give evidence in Court. But apart from this consideration sect. XCIX, where it says "the wife ...... of the accused ...... shall not be *called as a witness* without his consent", points to the same result.

Moreover, the section has, in their Lordships' view, no bearing on a case where husband and wife are being jointly tried. In such a case, on the one hand, the wife cannot be called as a witness against the husband, by reason of the wording of the section, and on the other, she cannot be prevented from giving evidence on her own behalf, nor can a statement she has made be shut out, since it is evidence against her.

So in the case of sect. CII. A statement made outside the witness box is obviously inadmissible against anyone except the person making it, but the section cannot be intended to prevent the police or indeed any third person outside a Court of law listening to the statement of a wife suspected of a crime or the wife from excusing herself or explaining the circumstances, even though the explanation or excuse may implicate her husband. The section is dealing with evidence given in the witness-box, and means that marital disclosures cannot there be given in evidence against an accused. The statement under consideration was neither given in evidence nor disclosed as evidence against the husband. It was admissible for and against the wife, and was rightly used as evidence in her case. The appellant has no cause of complaint under the sections The statement was not put in against him, but was properly used in the case of his co-accused, and the jury were carefully warned against paying any regard to it in his case.

In their Lordships' view, therefore, the sections do not avail the appellant.

They will humbly advise His Majesty that the appeal should be dismissed.

Appeal dismissed.

Criminal Appeal No. 322 of 1945

August 3, 1945

Kuppuswami Ayyar, J.

Tamina Mutyalu In re. *

Explosives Act (IV of 1884), Section 5—Possession of yellow phosphorus—If offence—Explosive Substances Act (VI of 1908)—Defence of India Rules, R. 54—Notification under—Scope of.

Yellow phosphorus by itself is not an explosive substance and mere possession of yellow phosphorus is not an offence under section 5 of Act VI of 1908.

Under that section the prosecution must prove that accused had in his possession an explosive substance under circumstances which lead to a reasonable suspicion that he is not having it for a lawful object.

Notifications issued under the Defence of India Rules declaring yellow phosphorus as an explosive substance aud prohibiting its possession do not amount to a notification under section 17 of the Explosive Substances Act.

Appeal against the Judgment of the Assistant Sessions Judge of the Court of session ,of the Kistna Division at Bezwada in Case No. 4 of the calendar for 1945.

B. Jagannadha Das & C. V. Dikshitalu, for accused.

Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT

The appellant has been convicted by the learned Sessions Judge of Kistna for an offence punishable under section 5 of Act VI 1908 and sentenced to tranpsortation for 5 years. He was charged also for having committed an offence under section 4 of that Act but he has been acquitted in respect of the same.

The Reserve Police Force which was temporarily located at Bezwada was housed in temporary huts by the side of the Bandar canal. On 15-11-1942, even before the huts were completed, a corner in line caught fire. On pulling down the palmyra leaves from the roof, two cotton balls were noticed each ½ an inch in diameter. The balls were suspected to be phosphorus balls. On 6-12-1942 when a sentry was keeping watch, he saw fire breaking out from the eastern side of the police line at 5-30 p.m. At 3 p.m. on 7-12-1942 the house of the accused was searched in which several articles were found, Mos. 1 to 17, viz., a congress flag, an earthern tub, a dirty black cotton, a cigarette tin containing yellow powder, another containing grey powder and a third containing chocolate powder, a cigar lighter with a rope foil, an empty tin, an empty green bottle, a white bottle containing white tablets, a bottle containing petrol, a bottle of denatured spirit, a big jar containing liquid like varnish, a sandal wood oil tin, a book of "Swatantragarjana." Rules and objects of Andhra Congress Socialist party and two books of "Bhinna Margamulu" of Andhra Rashtra Congress Sangam. Among the articles recovered was also a blue bottle with yellow phosphorus in the water inside. The accused was not there nor was he found. A charge sheet under section 436 I. P. C. Rule 35 (4) read with rule 1 (a) of the same rule and section 121 of the Defence of India Rules, and sections 3, 4 and 5 of the Explosive Substances Act read with Ordinance II and III of 1942, was filed. Sanction was accorded by the Government to the prosecution filed under sections 4 and 5 of the Explosive Substances Act. He was prosecuted for the charge framed only under Act VI of 1908, for possessing yellow phosphorus, and he has been convicted for an offence punishable under section 5 of that Act. On 19-10-1944 the accused surrendered himself before the Joint Magistrate, Bezwada. As pointed out by the learned Assistant Sessions Judge the committing Magistrate had indicated that though the police tried to connect the accused with the fire in the police line, the prosecution failed to connect him with the offence of setting fire to the police huts. The accused admitted that he had all articles mentioned above except the bottle containing phosphorus in water, which he said was not his But he said he had a smaller bottle in which he had kept some scent. There was evidence that when the house of the accused was searched there were mediators present then and when the articles were seized a mahazar was also written. From the evidence of the witnesses present, it is clear that all the articles, Mos. 1 to 17 were in his house and that M. O. 8 was one of them.

The main question for consideration is whether the yellow phosphorus which was said to have been found in M. O. 8 is an explosive substance, the possession of which is an offence under section 5 of the Act VI of 1908 which remarks

"Any person who makes or knowingly has in his possession or under his control any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it or

*1945 M.W.N. 689

does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punishable with transportation for a term which may extend to fourteen years, to which fine may be added, or with imprisonment for a term which may extend to five years, to which a fine may be added."

The prosecution has to prove that the accused had in his possession any explosive substance under circumstances which lead to reasonable suspicion that he is not having it for a lawful object. As already stated the committing Magistrate himself has found that it has not been proved that the accused had anything to do with the fire in the police lines. In the charge, it is stated that the explosive substances in his possession were phosphorus, petrol, denatured spirit, lead chromate, aluminium powder and ferric oxide. The appellant was a carpenter and there is nothing surprising in his having had petrol or denatured spirit; lead chromate, aluminium powder and ferric oxide for his profession. Therefore it cannot be said that, from the fact that he had them, he must have had unlawful intention or that there were circumstances to indicate that he was not having them for a lawful object. It is only in respect of the yellow phosphorus it is urged that its possession would make it an offence punishable under section 5. Yellow phosphorus by itself is not an explosive substance, and under section 2 of the Act, the expression "explosive substance" is defined as follows :—

"In this Act the expression explosive substance shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement."

It is stated in this case that it is a material used or intended to be used or adapted for causing or aiding in causing any explosion in or with explosive substances. It is not shown that this phosphorus was used or intended to be used for causing or aiding in causing any explosion. P. W. 11 who is the officiating Inspector of Explosives states that the yellow phosphorus found in M. O. 8 was an incendiary material, which spontaneously burns when exposed to air, that by itself it is not an explosive substance as defined under Explosive Rules. He said that under the Explosive Substances Act this phosphorus substance in conjunction with other explosive material may form a component part of an explosive contrivance. He added that the phosphorus may serve as the initilator to cause explosion of that explosive contrivance. He also stated that he did not find from the 6 material objects filed in this case that any combination of the same would form explosives. He further stated that he did not find any materials with relation to which any of the M. Os. including phosphorus can be regarded as explosives. He admitted that petrol was used for removing dust from furniture. As a matter of fact in Ex. E-1, the report submitted by this witness, he has not stated that any articles sent to him inclusive of the phosphorus which he destroyed were explosive in character. Nor has he stated that phosphorus falls within the category of explosive substances as defined in Act III of 1908. The learned Judge, after pointing out that the testimony of P. W. 11, the expert may not help, one to decide whether the material 'phosphorus' would fall clearly within the first or the second category of 'Explosive substance' as defined under section 2 of the Act, says that any doubt on the question must be held to have been set at rest by G. O. Ms. No. 4216, Home Department, dated 20-11-1942. It is a notification under the Defence of India Rules and has nothing to do with the Explosive Act and it says that His Excellency the Governor of Madras prohibits the possession or carrying, use, sale or other disposal by any person of yellow phosphorus, in the Province of Madras, except under, and in accordance with the terms and conditions of a license granted by the Provincial Government or the Commissioner of Police in the City of Madras and the District Magistrate concerned elsewhere. It no doubt prohibits the possession of yellow phosphorus without license. It is not for contravention of this notification issued under the Defence of India Rules the accused has been prosecuted and fined. In another G. O. Ex. H-2 it is mentioned that sulphur, sulphides of arsenic, red phosphorus and yellow phosphorus are substances, which are capable of being used in the manufacture of bombs. After quoting G. O. 387, Ex. H-2, the learned Judge observes, "By virtue of such notification red phosphorus and yellow phosphorus" are declared as explosive substances. In these two G. Os. all that is stated is that they can be used in the manufacture of explosives and therefore it is necessary to restrict the possession of such articles by individuals; but it cannot amount to a notification under section 17 of the Explosive Substances Act, 1884. Further this notification was under the Defence of India Rules and not under section 17 of the Explosive Act. All that is urged before

me is whether this phosphorus can be said to be a material used or intended to be used or adopted for causing, or aiding in causing, any explosion in or with any explosive substance. There is absolutely no evidence that the yellow phosphorus as found in the bottle had been used or was intended to be used in causing any explosion in or with any explosive substance, because it was found in water in the bottle in its ordinary state. It is only an incendiary. It can be used in a bomb which is an explosive substance as an incendiary, but there is nothing to show that this phosphorus as found was adapted for causing or adding any explosive in or with any explosive substance. If it had been used or was found in a state in which it was used or adapted for exploding a bomb, then it could be said that it would be an explosive substance as defined in section 4 of the Explosive Substances Act. In the natural form in which it was found at the time of the search in water in a bottle, it is not an explosive substance as defined in Act VI of 1908. I therefore find that the accused is not guilty of the offence with which he is charged. Possession of it might be an offence under the Defence of India Rules by virtue of the Notifications Exs. H-1 and H-2 but it is not the subject of the present charge.

Consequently the appeal is allowed, the conviction and sentence are set aside and the accused acquitted.

N.T.R. — *Accused acquitted.*

Criminal Revision Case No. 106 of 1945
Criminal Revision Petition No. 101 of 1945

July 27, 1945

KUPPUSWAMI AYYAR, J.

Muniswami Pillai

v.

Doraikannu Ammal*

Cr. P. C. (*V of* 1898), *S.* 489—*Order for maintenance—Subsequent living together —Effect.*

An order of a Criminal Court for maintenance in favour of the wife will become inoperative if subsequent to the order, the parties have lived together as husband and wife.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Special First Class Magistrate of Saidapet dated 18-10-1944 and made in M.C. No. 37 of 1944.

A. Ramaswamy Ayyangar, for Petr.

U. C. Gopalan, for Respt.

ORDER.

This is a petition to revise the order of the Special First Class Magistrate, Saidapet, enhancing the rate of maintenance awarded to the respondent, the wife of that petitioner in a previous order of the Court on the ground that life has become costlier and that she could not be able to live on the same rate of maintenance.

One of the objections raised by the petitioner (husband) is that he and his wife had lived together as husband and wife after the passing of the previous order and that therefore the original order of the Special First Class Magistrate has ceased to be effective; it will have to be decided whether a claim for maintenance is sustainable on subsequent conduct. Of course, the wife pleaded that there was no real living as husband and wife, that, when she applied on a prior occasion for enhancement of the rate and when that petition came on for hearing her husband, to escape the consequence of an enhancement of the rate, played a fraud on her stating thas he would take her back and maintain her and she agreed not to press the petition. But in two months he made it impossible for her to live with him in the house by placing her in charge of his cattle while he himself was going and messing in his concubine's house and sleeping there while her mother was feeding her The rule in *Venkayya* v. *Ragavamma* (1) is to the effect that an order for maintenance in favour of a Hindu wife must be regarded as having become ineffective if, subsequent to the passing of the order they happen to live as husband and wife. The question for consideration was stated at page 25 by his Lordship the Chief Justice as being whether a wife who has obtained a decree for maintenance could enforce it after having cohabited with her husband. Here the wife denied that she had cohabited with her husband and stated that she was only subjected to a ruse by her husband who offered to take her and made her live in his house but was not taken care of by him. She denies that she lived with her husband as husband and wife. If she had lived with her husband as husband and wife, an order whether a decree of a Civil Court or an order of a Criminal Court would cease to be operative and therefore she will have to base her claim on facts which happened subsequent to their living as husband and wife. The question has not been considered by the lower Court. The order of the lower Court is therefore set aside and the petition is remanded to the lower Court for considering this aspect of the case and disposing of the case in the light of these observations.

N.T.R. — *Case remanded.*

1. (1941) M.W.N. 978; I.L.R. 1942 Mad. 24.

Second Appeal No. 1924 of 1944

July 27, 1945

SOMAYYA, J.

Kalianna Goundan

v.

Settia Goundan and others*

Contract Act (IX of 1872), *Section* 23—*Complaint of rioting against six—Sworn statement implicating only four and disclosing compoundable offences only—Compounding—Legality—Cr. P.C. (V of* 1898) *S.* 345—*Object of sworn statement.*

The complaint implicated six persons as preventing the complainant from baling water, removing the baling stand and throwing it into the well. But in the sworn statement he attributed specific acts only to four persons and the Magistrate took the case on file under sections 447 *and* 426 *Penal Code and issued summonses in respect of those offences. The case was compounded.*

Held, *that as the sworn statement disclosed compoundable offences in respect of which alone summonses were issued, the agreement between the parties was not one to stifle non-compoundable offences.*

Complaints are often exaggerated and the object of a sworn statement is to see whether there is any justification for taking action in respect of all the offences disclosed by complaint. If in the sworn statement only minor offences are disclosed, the Magistrate is perfectly justified in taking action only as regards offences disclosed in the sworn statement.

Appeal against the decree of the district Court of Salem in A.S. No. 348 of 1943 preferred against decree of the Court of the District Munsif of Sankaridrug at Salem in O.S. No. 538 of 1940.

S. Tyagaraja Ayyar & T.N. Sunderesa Ayyar, for Applt.

D. Ramaswami Ayyangar, for Respt.

JUDMENT.

The lower appellate Court was clearly in error in thinking that the object of the agreement was to stifle non-compoundable offences. The complaint that was made by the defendant is Ex.P-2. He gave a sworn statement which was recorded by the Magistrate on the -nd August 1940. Though he implicated as many as six persons as accused in the complaint, when examined by the Magistrate he attributed specific acts only to four persons. He said that Pavayammal and Athayammal, accused 4 and 5, prevented him from baling out water by holding the rope and unyoking and driving away the bulls. Then he said that Kalianna Goundan and Marappa Goundan, accused 1 and removed the baling stand and threw it into the well. No doubt in between these two statements there is another statement that the first three accused removed the baling stand and threw it into the well. That apparently was a general statement which did not satisfy the Magistrate. So he appears to have asked the complainant who it was that actually removed the baling stand and threw it into the well. Then the complainant said that it was the first and third accused. No other acts are attributed either to the second or sixth accused. Seeing that specific acts are attributed only to accussed 1, 3, 4 and 5, the Sub-Magistrate was justified in taking the complaint on file under sections 447 and 426 of the Indian Penal Code. These two offences are admittedly compoundable offences. Summonses were issued to the accused only of offences under these two sections and that was all that they were called upon to meet. Hence even if the real object of the agreement, which is now in suit, was to compound the offences in respect of which summonses were issued to the accused, the validity of the agreement cannot be impugned. The parties were at perfect liberty to compound compoundable offences. The learned District Judge is not justified in stating that there was really a complaint of rioting and unlawful assembly under sections 147 and 148 of the Indian Penal Code and that the object of the agreement was to stifle these offences. Complaints are often exaggerated and the object of sworn statement is to see whether there is any justification for taking action in respect of all the offences disclosed by the complaint. If in the sworn statement only minor offences are disclosed the Magistrate is perfectly justified in taking action only as regards the offences disclosed in the sworn statement. This is what was done in this case. The District Judge seems to have been carried away by the fact that the agreement in question was entered into in the presence of the Sub-Inspector. His remarks against the Sub-Magistrate are entirely unjustified. I find that the real object of the suit agreement was not to stifle non-compoundable offence.

The result is that the decree of the lower appellate Court is reversed and that of the trial Court restored. I make no order as to costs here or in the lower appellate Court.

No leave.

N.T.R. —— *Appeal allowed.*

* 1945 M.W.N. 697

PRIVY COUNCIL

(Appeal from Oudh at Lucknow)

March 1, 1945

LORD THANKERTON, LORD SIMONDS, LORD GODDARD, SIR MADHAVAN NAIR & SIR JOHN BEAUMONT, JJ.

Judah

v.

Isolyne Shrojbashini Bose & another*

Evidence Act (I of 1872), S. 145—Letter and telegram by witness—Admissibilty.

A letter written by a witness to a party is no evidence of the facts therein stated. The only legitimate use to which the letter could be put would be to use it in cross-examination for the purpose of discrediting the witness.

Two telegrams, put in evidence, were not produced by the addressee but by a party who gave no evidence as to how she came by them. It was never proved who the sender was and the person who it was suggested had despatched them denied she had done so.

Held, *that the two telegrams could not be admitted in evidence and further the contents of the telegrams were not evidence of the facts stated in them.*

A.W. Wallach, for Applts.

C.S. Rewcastle & H. Deplock, for Respts.

JUDGMENT

Lord Goddard: The proceedings out of which this consolidated appeal arises concern the testamentary dispositions of Mrs. Manmohini Mitter, a widow formerly living at Lucknow. She died on 7th April, 1943, leaving three daughters her surviving, the appellant who was the youngest, the first respondent who was the second daughter and the second respondent the eldest. When their mother died each daughter produced a will which she claimed was the last true will of the deceased. Each daughter petitioned the Court of the Civil Judge at Lucknow for letters of administration with the respective wills produced by them annexed, and three petitions were consolidated and tried as one suit. The will propounded by the appellant is dated 12th April, 1930; that propounded by the first respondent is dated 8th September, 1930 and the third will is dated 4th November, 1933. During the hearing of the case the two respondents came to terms; they each admitted the validity of the will propounded by the other. They agreed that letters of administration should be granted to the second respondent with the will propounded by her annexed, but that if the court refused to admit that will then the will propounded by the first respondent was to be admitted and in either event they were to share the estate in the proportion of one-third to the first respondent and two-thirds to the second respondent. But that did not dispose of the will propounded by the appellant, as to which both respondents denied its due execution. In addition the first respondent alleged that at the date of execution the testatrix was not of sound disposing mind, though the second respondent did not challenge her capacity.

In support of her case the appellant called the three attesting witnesses of the will of 12th April, 1930. She herself did not give evidence and this was made the subject of comment by the Chief Court. It is not clear to their Lordships what relevant evidence she could have given, either as to the execution of the will or as to her mother's state of health on the material day, as there was no suggestion that she was at the house or even in Lucknow about the time, either before or after that the will was executed. Of the three witnesses to the will one was a professor at the Lucknow Christian College, another a medical man who had been some 20 years in practice and was on the staff of a Medical College at Lucknow and the third a clerk in the employment of a business house. The will was actually written out for the deceased by the professor who subscribed as the first witness. It is to be observed that all three witnesses had been sent for by the deceased herself and were entirely disinterested. They were all in agreement as to the due execution of the will and that the testatrix was clear in her mind and knew what she was doing. She herself dictated the will to the Revd. Mr. Sicar. That she was unwell at the time is admitted. She told the doctor that she had had a vomitting fit that day, and also that in the previous year she had an attack of paralysis and the vomiting caused her to fear another attack which would be a very good reason for her wanting to make a will. The docter however was quite satisfied that she was fully conscious and aware of what she was doing. These witnesses were really not challenged in cross-examination, nor was any evidence called to contradict them, except that at a late stage the second respondent was allowed to give evidence in rebuttal. She was called apparentely because she holds some sort of medical degree to testify to the effect of an attack of apoplexy on the mental condition of the person attacked. Her evidence was

* 1945 M.W.N. 634

entirely worthless and indeed inadmissible. It was based entirely on hearsay; she had not seen her mother at or about the material time nor was there any evidence that the deceased ever had an apoplectic seizure, nor can their Lordships think of any more unsatisfactory evidence than that of an interested party called as an expert. In a careful and full judgment the Judge of Civil Court accepted the evidence of the three attesting witnesses whom he had seen, and it is indeed difficult to see how he could have done otherwise considering that, as already stated, it was uncontradicted. He therefore pronounced for the will propounded by the appellant. With regard to the wills propounded by the respondents, either of which if valid would of course have the effect of revoking the earlier one, he held that they were not duly executed and in addition that the will propounded by the second respondent was obtained by coercion and was not the will of the testatrix. Accordingly he granted letters of administration with the will of the 12th April, 1930 annexed to the appellant.

The respondents then appealed to the Chief Court of Oudh. That Court affirmed the judgment of the Civil Judge so far as he found against the two later wills, but allowed the appeal against his finding in favour of the will propounded by the appellant. It is against this latter finding that this appeal is brought. The respondents have not appealed. The learned Judges of the Chief Court found themselves unable to believe the evidence of the three attesting witnesses as to the state of mind of the testatrix. Their only reasons for this were the contents of a letter written by the appellant's daughter and of two telegrams both signed "Grace" which they assumed were sent by a Mrs. Grace Paul, a professional nurse, though there was no evidence whatever that she had sent them and in the witness box she denied all knowledge of them. Dealing first with the letter which was written to the appellant, it is undated and the girl in her evidence said she wrote it not in 1930 but in 1929. Both Courts however thought from internal evidence in the letter that she was mistaken about this and that the letter was in fact written in April, 1930, and within quite a short time of the execution of the will, and their Lordships assume that this finding is correct. The girl was staying with her grandmother and evidently resented having to nurse her and do all the housework in addition. She wanted to be relieved of this and go home, so very naturally drew a somewhat gloomy picture of the conditions with which she had to cope, but was careful to say that the patient was not so ill that she could not leave her. The letter is no evidence of the facts therein stated. The girl herself gave evidence and the only legitimate use to which the letter could be put would be to use it in cross-examination for the purpose of discrediting or suggesting that the testatrix was incapable of making a will in April, 1930, nor if there was could the opinion of a girl of 17 be accepted against the evidence of a doctor who was quite disinterested and who was supported by two equally disinterested and respectable witnesses. With regard to the two telegrams it would be enough to say that their Lordships do not understand how they came to be admitted as evidence. They were not produced by the addressee but by the second respondent who gave no evidence as to how she came by them. It was never proved who the sender was, and Mrs. Paul who it was suggested had despatched them denied she had done so. Then again the contents of the telegrams are not evidence of the facts stated in them, nor is there anything in them to snow that the testatrix were incapable of making a will. It was all along common ground that she was unwell when she executed the will but that is a long way from saying that she had no testamentary capacity. Their Lordships are unable to find that the Chief Court had any sufficient ground for differing from the conclusion of the learned Civil Judge who saw and believed the attesting witnesses and with whose judgment their Lordships think it right to say they entirely agree.

The result is that the appeal should be allowed; the decrees of the Chief Court should be set aside and the decree of the Civil Judge restored. Under that decree the appellant gets her costs in the Civil Court, and the respondent must pay the cost of the appeals to the Chief Court and of this appeal. They will humbly advise His Majesty accordingly.

Appeal allowed.

Criminal Appeal No. 276 of 1945
July 26, 1945.
SIR LIONEL LEACH, C. J. &
RAJAMANNAR, J.

The Crown Prosecutor, Madras
v.
V. R. Ramanatha Aiyar*

Prevention of Adulteration Act (Madras Act III of 1918)—Rules under—R. 28-B—Ingredient of sweetmeat—What is.

* 1945 M.W.N. 636

Ghee, oil or other fatty substance used for frying sweetmeats is not an ingredient of, the sweetmeat within the meaning of Rule 28-B of the Prevention of Adulteration Rules.

Appeal under Section 417 of the Code of Criminal Procedure 1898, against the acquittal of the aforesaid respondent (Accused) by the Chief Presidency Magistrate of the Court of the Presidency Magistrates Egmore, Madras in M. No. 187 of 1944 on his file on 15-1-1945.

The Crown Prosecutor (P. Govinda Menon), for Crown.

V. Rajagopala Mudaliar, for Respt.

JUDGMENT

(SIR LIONEL LEACH, C.J.)

This is an appeal by the Provincial Government against the accquital by the Chief Presidency Magistrate of the respondent on a charge framed under rule 28-B of the Madras Prevention of Adulteration Rules, 1932, framed under the Prevention of Adulteration Act. The respondent is the proprietor of a restaurant known as ' The Ramakrishna Lunch Home" in China Bazaar Road, Madras. He makes and sells a sweetmeat called *jangiri*. The ingredients of *jangiri* are blackgram, rice and sugar. The sweetmeat is generally made by frying the ingredients in ghee. It is said that in some hotels oil is used for this purpose. On the 25th February 1944, a Food Inspector visited the respondent restaurant and purchased a quantity of *jangiri* which was then being offered for sale. He had a sample analysed by the Public Analyst of the Corporation of Madras, who found that the fat used for cooking this particular *jangiri* consisted of 50 per cent ghee and 50 per cent fat not derived from milk or cream.

Rule 28-B says that where in a hotel, shop or other place sweetmeats, savouries or other articles of food of which ghee is commonly an ingredient are for sale and are prepared wholly or in part with a mixture referred to in rule 28 or with oil or fat other then ghee, there shall be exhibited in the hotel, shop or other place one or more notices of such size and so placed as to be visible and clearly legible to any customer at the time of purchase that the sweetmeats, savouries, or other articles of food are not made of ghee. There was no such notice exhibited in the respondent's restaurant and consequently it is said that he infringed this rule. The Chief Presidency Magistrate held that ghee or oil or other fatty substance used for frying *jangiri* is not an ingredient of the sweetmeat and consequently he acquitted the respondent.

The Chief Presidency Magistrate accepted the definition of "ingredient" as given in Chambers' Dictionary, namely:

"that which enters into a compound; a component part of anything."

One definition of the word given in the Oxford Dictionary is:

Something that enters into the formation of a compound; a component part, constituent, element.

We agree with the Chief Presidency Magistrate that the material used for cooking *jangiri* is not an ingredient. The ingredients are blackgram, rice and sugar and they have to be cooked together in order to make *jangiri*; but this does not mean that the cooking material is part of the sweetmeat. No doubt some of the cooking material does penetrate into the *jangiri* but that does not make it an ingredient. If the argument advanced by the Crown Prosecutor were to be accepted, it would mean that the fat used in frying fish must be regarded as an ingredient of the fish.

The appeal is dismissed.

N.T R. — — *Appeal dismissed.*

Criminal Revision Case No. 408 of 1945
(Case Referred No. 26 of 1945)

July 26, 1945

KUPPUSWAMI AIYAR, J.

Bhupatiraju Ramaraju, In re*

Evidence Act (I of 1872*), Section* 114, *Ill. (a) —Accused deaf and dumb—Presumption under—Criminal Procedure Code (V of* 1898*), Section* 341.

Where the accused was a born deaf and dumb mute and was charged under sections 457 *and* 380 *I. P. C. and the only evidence against the accused was that he was found in possession of the stolen articles and the accused could not be made to understand the proceedings,*

Held, *that the presumption under S.* 114, *Evidence Act could not be drawn against the accused.*

Case referred for the orders of the High Court under section 341 of the Criminal Procedure Code, by the District Magistrate of West Godavari in his letter dated 21-4-45.

Public Prosecutor (*V.L. Ethiraj*), for Crown.

ORDER

This is a reference to this Court by the District Magistrate of West Godavari. He has submitted the records in C. C. 475 of 1944 on the file of the Sub Magistrate, Bhimavaram under section 341 Cr. P. C. for passing the necessary orders thereon. The accused in the case was a born deaf and dumb mute. He

* 1945 M.W.N. 692

was charged under sections 457 and 380 I.P.C. for having broken open into a house and having committed theft of two brass vessels and a tiffin carrier. Under Section 341, Criminal Procedure Code if an accused person though not insane, cannot be made to understand the proceedings the Court may proceed with the inquiry or trial and in the case of a Court other than a High Court if such inquiry result in a commitment or if such trials results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case and the High Court shall pass thereon such orders as it thinks fit. In this case the Magistrate has found the accused guilty of the offence under sections 457 and 380 I.P.C. There is no direct evidence of theft or house breaking. The only evidence about the commission of the offences is that of P.W. 1. He had locked his house and gone one night and returned the next morning. The lock was found picked and a tiffin carrier and two brass vessels kept inside were missing. The evidence against the accused is that they were found in his possession. The police chased him and he dropped the vessels. That is all the evidence we have in this case. Even though there is no direct evidence of theft or of house breaking and the only evidence is the possession by the accused of stolen articles shortly after the theft it will be open to the Court to draw a presumption that he must have been the thief *if he is not able to satisfactorily explain that possession.* If the theft could not have been committed without house breaking it may be presumed he must have committed the house breaking. That the articles were stolen and that they must have been obtained by house breaking is clear from the evidence of P.W. 1. But that will only show that house breaking and theft were committed. But the question is whether it is the accused that committed it. The only evidence against him was that he was in possession of them. An inference under section 114 of the Evidence Act could be drawn only if he is not able to explain his possession of them. It is not possible to communicate with the accused because he was born deaf and dumb and there is nothing to indicate that he was asked to explain or he explained If he could not be made to understand what he was asked and if he could not give an explanation, no inference under section 114 can be drawn. It is only if an explanation is called for and he fails to give a satisfactory one, such a presumption could be drawn. In these circumstances, I do not think I will be justified in supporting the conviction. It is unnecessary to take further steps in this case in view of the fact that the accused has been in jail for three months. He is accordingly acquitted and set at liberty.

N.T.R. — *Accused acquitted.*

R. T. No. 111 of 1945

August 28, 1945

Horwill & Bell, JJ.

Gangavva and another **In re***

Evidence Act (I of 1872), S. 30—'Confession' —Must be of offence charged.

The confession of an accused disclosing an offence under S. 201, Penal Code cannot be used against a co-accused tried for murder under S. 302 Penal Code.

Trial referred by the Court of Session of the Bellary Division for confirmation of the sentence of death passed upon the said Prisoners—Accused Nos. 1 and 2 in Case No. 12 of the Calender for 1945 on 3-7-1945 and appeal by the appellants above-named against the judgment of the Court of Session of the Bellary Division dated the 3rd day of July 1945 and passed in the said Sessions Case No. 12 of 1945.

P. Basi Reddy & S. Narasimha Ayyangar, for Accused.

Public Prosecutor (V. L. Ethiraj), for Crown.

JUDGMENT.

(Horwill, J.)

The three appellants were charged in the Court of the Sessions Judge of Bellary under section 302 of the Indian Penal Code with the murder of a boy aged 6 years, named Ramappa, by cutting his throat. The learned Sessions Judge convicted the first and second appellants of the offence with which they were charged and sentenced them to death. He however accepted the explanation furnished by the third appellant in his confessional statement that he took no part in the murder and was not aware that it was going to be committed, and so found him guilty only under section 201 of the Indian Penal Code; because he had buried the knife with which the murder was committed. He was sentenced to 5 years' Rigorous Imprisonment.

As the offence was committed in the house of P. W. 4 during the absence of himself and his wife and there were no persons in the house other than the murdered boy and his little sister aged 3, there are no actual eye witnesses of the murder. But there is important circumstantial evidence of persons who saw the three appellants enter the house of P. W. 4 and who saw them leave again. P. W. 5 was working in his rick yard only 100 yards away from the house of P. W. 4:

* 1945 M.W.N. 722

and he saw the three appellants both enter the house and leave it. P. W. 6 did not actually see the accused leaving P. Ws. 4's house, but he saw them at 2 or 3 yards from the house as they were emerging from the back-yard. P. W. 7 saw the accused going from their village towards the village of P. W. 4 and asked them where they were going. The third appellant replied that he was going to the house of P. W. 4 to get two bags of cholam for the first appellant. P. Ws. 8 and 9 were grazing bulls and saw the three appellants going in the direction of P. W. 4's village. They too, asked the appellants where they were going and why; and the third appellant gave the same answer to them as he had given to P. W. 7. P. W. 4, the father of the murdered boy, was not absent for very long from his house. He left late in the afternoon and came back just at dusk: and it was during his short absence that the three appellants entered the house of P. W. 4 and it was during that time that the boy Ramappa was murdered. It is a reasonable conclusion to draw from the circumstances that the three appellants committed the murder. In the Courts below they all denied that they entered the house of the P. W. 4; but we see no reason at all for not accepting the disinterested evidence of these five witnesses.

The learned Sessions Judge took into account against appellants 1 and 2, the confessional statement of the third appellant, (Ex. H), in which he said that the three of them went from their village along a certain foot-path to the house of P. W. 4, removed the door of the rick yard, and found inside the deceased boy and his little sister playing in the yard. The boy was decoyed into the kitchen by the offer of a two-anna piece and while the third appellant was standing in the padasali in front of the kitchen door, the first appellant held the little boy over the oven while the second appellant cut his throat with the knife which she had, allowing the blood to flow into the ashes of the oven. He exclaimed "You have ruined my maternal uncle's house." The first and second appellants, who are women, brought out the weapon used in the commission of the crime wrapped in a piece of blue cloth. They handed over the knife and the cloth to him asking him to conceal it which he did. As a result of this confession made to the police, the police and panchayatdars proceeded to the spot indicated by the third appellant, from which he produced the knife wrapped in the cloth.

It has been argued that the above statement is not a confession at all, because the third appellant did not implicate himself in any way; but we have no doubt that it is a confession of an offence punishable under s. 201, I. P. C., for he admittedly buried the knife in order to conceal evidence of the murder. The more important question, however is whether this statement, which amounts to a confession of an offence punishable under s. 201, I. P. C., can be used against the first and second appellants in the charge under s. 302, I. P. C. The learned Public Prosecutor argues that it is admissible in evidence; and his line of reasoning is this; when a person is charged with a serious offence, he is also charged by implication with every offence comprising any combination of circumstances which may form the constituents of the major offence; so that when a person is tried for murder, and part of the evidence of the murder is the concealment of the weapon with which the murder was committed, then the person charged with the murder is also charged by implication with an offence punishable under S. 201, I. P. C.; the confession of this minor offence by the third appellant could therefore be used against the other appellants; because they were charged with the minor offence also; if it was admissible against the other appellants, then it can be taken into account against them for all purposes, even though they might be charged with the major offence and convicted of it. In *In re Manicka Padayachi* [1] the learned Judges had to consider whether a confession of an offence that was punishable under S. 328, I. P. C. could be used against the other accused to support the evidence than an offence had been committed by him punishable under S. 328, I. P. C., when the charge preferred against him was under S. 302, I. P. C. The learned Judges differed; and so the matter was referred to a third Judge, Oldfied, J. He pointed out that the person who made the confession had been convicted only under S. 328, I. P. C. and that that was the section under which the other accused, if the confession were accepted, would also be convicted. That case is therefore not on all fours with the present case; but the learned Public Prosecutor relies on certain *obiter dicta* to be found in the judgment. The learned Judge said:

> "The correct view is clearly that persons under trial for a major offence are also being charged with and tried for any minor offence or offences constituted by the particular ingredients of the major offences which may be proved."

1. (1921) 14 L. W. 474

If that were so, then S. 237 of the Criminal Procedure Code would seem to be redundant: for a person irrespective of S. 237 of the Criminal Procedure Code could then be convicted of a minor offence even though not specifically charged with it. There are two cases to which we have been referred which deal directly with the point raised here. They are *In re Periyaswami Moopan* [2] and *Syed Hussain Sahib* v. *Emperor* [3]. In the former case Reilly, J said:

"......the confession must be of the kind intended by the Legislature when enacting section 30 (of the Evidence Act). What kind of confession is intended? The words of the section are 'when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved.' In my opinion 'confession' in that collocation of words cannot reasonably be interpreted to mean a confession of any offence in the world, nor even of any minor offence included in the offence for which the accused persons are being tried, nor of any offence connected with that offence, nor of any other offence which may be disclosed by the evidence, but only of the very offence for which they are being tried, 'offence' always including under the explanation to the section abetments and attempts .... In my opinion we must read the word 'confession' as if it were followed immediately by the words 'of that offence'......"

The learned Judges there refused to accept a confession disclosing an offence under section 201 of the Indian Penal Code against a co-accused tried and convicted of murder. In *Syed Hussain Sahib* v. *Emperor* [3], the same question had to be considered, namely how far a confession of an offence under section 201 of the Indian Penal Code could be used against a co-accused charged with murder The learned Chief Justice said:

"In the first part of Ex. F (the confession in question) he (the person who made the confession) accused his wife of having committed the murder and would have it that he was away at the time. This statement cannot be taken into consideration so far as it affects the second appellant on the charge of murder. He does not include himself in the accusation and, therefore, under section 30 of the Evidence Act, this statement cannot be admitted against the wife. Ex. F can, however, be taken into consideration under section 30 as against both the appellants on the charge under section 201."

The principle laid down in these two cases must prevail over the dictum of Oldfield J.

Although we are holding that in view of the statement of law laid down in *In re Periyaswami Moopan* [2] and *Syed Hussain Sahib* v. *Emperor* [3], the confession of the third appellant cannot be taken into account against the other two appellants with regard to the charge under section 302, we are nevertheless satisfied from the evidence of P. Ws. 4-7 referred to above that the first and second appellants are guilty of the offence with which they were charged The sentence imposed on them is undoubtedly the proper one in the absence of any extenuating circumstance. The murder seems to have been coldly and brutally planned.

The third appellant has preferred a separate appeal. Against him there is the same evidence as against the other two appellants; but in addition to the evidence of P. Ws. 5 to 9, there is the evidence of his own confession. The learned Judge was prepared to accept the statement contained in the confession at its face value. We think that the appellant was extremely fortunate in the learned Judge's taking this view. He was the only male in the party and was presumably taken in order to play the man's part. It seems incredible that the women would have taken with them a person who might well have been a witness against them unless it was intended that he would participate in the murder. The circumstance that the knife was traced back to him is a further indication, that in all probability he himself played the principal part in the murder.

Taking the most lenient view of the evidence against him, the appellant was guilty of an offence punishable under S 201, I. P. C. On his own admission, he stood by and allowed this little boy of six years of age to be murdered before his eyes, without attempting to intervene; and so the sentence of five years' R. I. is certainly not excessive.

The convictions and sentences are confirmed and the appeals dismissed.

N.T.R. —— *Appeals dismissed*

Referred Trial No 127 of 1945

Criminal Appeal No. 474 of 1945

September 21, 1945

HORWILL & BELL, JJ.

Durasiwami Goundan, In re*

Criminal Procedure Code (V of 1898), S. 342 —Questioning accused under—Object of— —Proper form.

The object of questioning an accused by the Court under sec. 342, Criminal Procedure Code is to give the accused an opportunity of explaining the circumstances that appear against him in the evidence.

The habit of summarising the whole evidence and asking the accused what he has to say with regard to it tends to defeat the object of the section. The attention of

2. (1930) M.W.N. 868 : Cr. 202 : I L.R. 54 Mad. 75.
3. (1937) M. W. N. 1233 : Cr. 249

*1945 M.W.N. 730

the accused should be drawn to the salient features of the prosecution case that seem to call for some explanation.

Trial referred by the Court of Session of the South Arcot Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 27 of the calendar for 1945 dated 19-7-1945 and appeal by the said prisoner against the said sentence of death passed upon him in the said case.

G. N. Chari, for Accused.

Assistant Public Prosecutor (A.S. Sivakaminathan), for Crown.

JUDGMENT

[Horwill, J.]

The appellant has been convicted by the Sessions Judge of South Arcot of an offence punishable under section 302, I.P.C. and has been sentenced to death.

The sentence as well as the conviction are therefore confirmed and appeal dismissed.

Before closing this judgment mention ought to be made of the manner in which the Committing Magistrate questioned the accused. The object of questioning an accused by the Court under section 342, Cr. P. C. is to give the accused an opportunity of explaining the circumstances that appear against him in the evidence. Unfortunately, since the Privy Council decision in *Dwarakanath Varma* v. *The King-Emperor* [1]. Courts have cultivated the habit of summarising the whole evidence and asking the accused what he has to say with regard to it. A summary at considerable length tends to defeat the object of section 342, Criminal Procedure Code; because the attention of the accused is not drawn thereby to the salient features of the prosecution case that seem to call for some explanation. To an ordinary straightforward account of witnesses of an actual occurrence no detailed questions seem necessary. On the other hand, if, for example, some article is found in the accused's house which points in an emphatic manner to the accused's resposibility for the crime, he should be given an opportunity of offering an explanation of the presence of that article in his house. In his questions to the accused the Committing Magistrate has given a long precis of the whole prosecution evidence, which is a particularly bad example of a misunderstanding of the above Privy Council decision and is an abuse of the provisions of section 342, Criminal Procedure Code. Fortunately, in a straightforward case like this no injury could have resulted to the appellant from this examination.

N.T.R.

1. (1933) M.W.N. 409; Cr. 57

Referred Trial No. 132 of 1945 &
Criminal Appeal No. 501 of 1945
October 9, 1945
HORWILL & BELL, JJ.

Golla Chenchuramayya & another In re*

Penal Code (XLV of 1860) Sections 34 & 302 —Two persons beating deceased on head—Death—Offence—Sentence.

The two appellants suddenly left their field to see the cause of the cries and shouts of persons who were quarrelling. The second accused signified his disapproval by striking his pitchfork on a stone but that had no effect. After some little time he became angry and struck the deceased on the head with the pitchfork. The first accused almost immediately raised a heavy stick taken from the side of a cart, and struck the deceased on the head The decased fell down immediately and died next day. When examined by the doctor, the deceased was found to have an extensive and radiating fracture of the skull forming a diamond-shaped depressed fracture, the sides of the diamond being two inches.

Held, (*i*) *that the accused, even if they had the same intention, cannot be said to have been actuated by a common intention, and that each was responsible only for his acts.*

(*ii*) *It was possible that first blow might not itself have had fatal consequences and that therefore the second accused who struck first could be found guilty only of causing simple hurt with a dangerous weapon under section 324, I.P.C.*

(*iii*) *Even if the fracture was caused entirely by the second accused, the first accused would still be guilty of murder; because his blow delivered immediately after the blow of the second accused must necessarily have accelerated the death of the deceased.*

(*iv*) *That as the murder was unpremeditated and was committed in sudden anger, the sentence of transportation for life was more appropriate.*

If a Court has alternative sentences, it should take into consideration all the circumstances of the case and award the sentence which seems to it in view of the circumstances the more fitting.

Trial referred by the Court of Session of the Nellore Division for confirmation of the sentence of death passed upon the said prisoners in Case No. 10 of the Calendar for 1945 and appeal by the prisoners—Accused 1 and 2 against the said sentence.

*1945 M.W.N. 732

K. S. Jayarama Ayyar & R. Ramalinga Reddi, for Accused.

Public Prosecutor (*V. L. Ethiraj*) on behalf of Crown.

JUDGMENT.

(HORWILL, J.)

The appellants and another were charged before the Sessions Judge of Nellore with the murder of one Gurusami. The learned Sessions Judge found that there was no evidence that the third accused took any part in the transaction in which the murder was committed. He therefore acquitted that accused. He convicted the two appellants of murder and sentenced them to death.

The deceased, the three accused, and the eye witnesses are all Thottians and members of connected families. P. W 3 is the husband of P. W. 6 and the P. Ws. 4 and 5 are their daughters The deceased was married to P. W 5 and a brother of the two appellants was married to P. W. 4. P W. 7 and the deceased were the sons of sisters, while P.W. 8 was a brother of the deceased.

The quarrel that led up to this murder arose out of a dispute with regard to some ragi. P. W. 4 had a sick child and she wanted to purchase a talisman that it might wear to recover its health; and in order to raise the money she took some of the family ragi. She was rebuked for this by the wife of the third accused who was the senior female in the family. P. W. 3 came along while the quarrel was taking place and rebuked the women for quarrelling. P. W. 3 later came to blows with the third accused and was knocked down. That led to further recrimination among the women, who then created such a disturbance that the two appellants, who were working in a field about a furlong away, came running to the spot to see what had been done to their women. Even after they arrived, the quarrel continued; and the appellants became more angry as they heard and saw what was taking place. The second accused first expressed his annoyance by striking a stone with his pitchfork. That had no effect and after some little time he became so annoyed that he took his pitchfork and struck the deceased on the head with it. The first accused almost immediately raised a heavy stick taken from the side of a cart, and struck the deceased on the head. The deceased fell down immediately and died on the following day. When examined by the doctor, the deceased was found to have an extensive and radiating fracture of the skull, forming a diamond-shaped depressed fracture the sides of the diamond being about two inches. The piece that had been displaced was broken into eight smaller pieces, which had been driven into the brain substance. There was no possibility of recovery from this grave injury.

Although all the eye witnesses are persons connected with the deceased, they are also interested in the accused; and there is no reason to suppose that their evidence was not true. A complaint was given as early as practicable, and at all stages their evidence has been consistent. The truth of the material part of their story is confirmed by the circumstance that the accused were long absconding. There are no important contradictions in their evidence; and the learned judge says that they impressed him while in the box as persons speaking the truth.

The learned Advocate for the appellants very rightly does not contend that the evidence of these witnesses is untrustworthy. He has argued that from the medical evidence it would appear that the deceased received only one blow; but that is not the case. P.W. 1, the doctor who conducted the post-mortem examination, does say that the injuries could have been caused by one heavy blow; but he does not say that they could not have been caused by two blows, as the eye witnesses say. On the contrary, he says that the injuries might have been caused by two blows. It would also seem probable that there were blows; because the contused area on the head was most extensive It spread from the seat of fracture across the frontal bone to the other side of the head.

If the appellants were jointly responsible for the injuries caused, then they were undoubtedly guilty of murder The learned Sessions Judge does not discuss whether they were actuated by a common intention; but his judgment seems to proceed on that basis. It seems difficult, however, to come to the conclusion that there was a common intention to kill the deceased. The appellants suddenly left their field to see the cause of the cries and shouts of the persons who were quarrelling They did not immediately attack anybody, In fact, they might not have known who was responsible for the cries of their womenfolk, The second accused as has already been said, signified his approval by striking his pitchfork on a stone, and it was only after they had been some time at the scene of offence, that they became angry and struck the deceased. Since the second accused struck first the first accused may well have intended to

cause the death of the deceased, because he saw what the second accused had done; but the second accused, as far as we can see from the evidence, had no reason to suppose that the first accused would follow his example and strike the deceased. Even therefore if they had the same intention, they did not have a common intention, the distinction between a like intention and a common intention being pointed out very forcibly in *Mahbub Sahah* v. *Emperor* [1].

If the two appellants were not actuated by a common intention, then each is responsible only for his own acts. The second accused was armed with a pitch-fork which has a diameter of about an inch and a half at its thick end. We have no doubt that such a weapon if used with considerable force, would be sufficient to cause a fracture; but the question which we are unable to decide is whether, in fact, it did so. One often comes across cases where a lethal weapon is used under circumstances which indicate that the person using it intended to cause death or grievous hurt; but either because the assailant was not suitably placed for delivering a heavy blow or because of the movements of the person at whom he was aiming, only trivial injuries have been inflicted. It may therefore well be that although the accused may have intended to cause grievous injury with his weapon, he may not in fact have done so. This doubt is strengthened by the medical evidence that the whole injury might have been caused by one blow. It is therefore possible, though perhaps not probable, that the serious injury to the head was caused almost entirely by the second blow and that the first blow might not by itself have had fatal consequences. If that is so, the second accused, who struck the first blow with the lighter instrument, can be found guilty only of causing simple hurt with a dangerous weapon, an offence punishable under section 324 of the Indian Penal Code.

The case against the first accused seems to us to stand on a very different footing. He saw that the second accused had struck the deceased on the head with his stick, and yet he immediately raised a heavy weapon and struck a blow which felled the deceased to the ground. If the second accused did not cause a fracture of the skull or caused a fracture less serious than that found on post-mortem examination, then the act of the first accused would clearly amount to murder; because he was either almost entirely responsible for the death of the deceased or materially contributed to it. Even if the fracture was caused entirely by the second accused the first accused would still be guilty of murder; because his blow, delivered immediately after the blow of the second accused, must necessarily have accelerated the death of the deceased. It therefore seems to us that the first accused must have been guilty of the offence with which he was charged.

The learned advocate for the appellants' relies on certain observations of the learned Sessions Judge to indicate that it is unlikely that the appellants had the intention necessary for a conviction under section 302 of the Indian Penal Code.

The learned Sessions Judge said:

> "The seriousness of the blows was not known either to the accused or to the other party at that stage, because the evidence shows that when the accused were leaving the place the third accused gave a parting kick to the fallen Guruswami, stating that he was shamming. The relatives of Gurusami had run home and fetched dry ginger powder and cotton in order to render first aid and bring Gurusami back to consciousness. The accused went and stood near their house for a time and as a crowd started to gather they went inside their house."

At the best this would only indicate that the third accused, who has been acquitted, and the relatives of Guruswami still believed that there was a chance of Guruswami's recovering; but we must assume that the two appellants, who delivered the blows, intended the probable consequences of their acts. They alone knew the force with which their blows were delivered. The conviction of the first accused under section 302 of the Indian Penal Code is therefore confirmed and the conviction of the second accused changed from one under section 302 to one under section 324 of the Indian Penal Code.

There remains the question of the sentence to be imposed on the first accussed. The learned Sessions Judge said on this point:

> "So far as the punishment is concerned, there are no extenuating circumstances in law to merit the lesser of the two sentences prescribed. The accused on account of momentary passion have killed a middle aged ryot who was the bread winner of his family. The fact that they are middleaged ryots or that they were living amicably before with the deceased and that the offence itself arose from an unexpected altercation that evening and that offence has not been accompanied by aggravating features are all matters, which cannot be considered by Court as extenuating circumstances for awarding the lesser of the two sentences. They are fit matters to be considered when the prerogative of mercy comes to be exercised and which is in other hands.

We cannot agree with this exposition of the law. If a court has two alternative sentences, it should take into consideration all the circumstances of the case and award the sentence which seems to it in view of those circumstances, the more fitting. The learned Judge

1. (1945) M.W.N. 373 : Cr. 69 P.C.

has himself in the passage set out above given reasons why it would be more appropriate to sentence the appellants to transportation for life, and there is very little to add to what the learned Sessions Judge has said. The evidence shows that the murder was unpremeditated and that the act was committed in sudden anger. The sentence of death is therefore changed to one of 'transportation for life'. The second appellant is sentenced to three years' rigorous imprisonment.

N.T.R.

Crl. Revn. Case. No. 640 of 1945
(Crl. Revn Petn. No 598 of 1945)
October 26, 1945
CHANDRASEKARA AIYAR, J.
Thambi Iyengar & others, In re*

Gaming Act (Madras Act III of 1930), Sections 5 & 6—Warrant—Presumption.

It is only if there is a proper compliance with the terms of section 5 that the presumption under section 6 will apply.

Where the warrant issued under section 5 stated that information had been laid before him (the officer issuing it) that gambling was going on in house No..., but did not set out that the officer who issued it had reason to believe that the house in question was being used as a common gaming house.

Held, *the presumption under section 6 did not arise.*

Petition under s. 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the Judgment of the Court of the Sub-Divisional Magistrate, Kumbakonam is Crl Ap 12/45 dated 23-4-45 preferred against the Order of the Court of the Stationary 2nd Class Magistrate, Kumbakonam in C.C. 1280 of 1944.

G N. Chari, for Petr.

Public Prosecutor (V.L. Ethiraj) for Crown.

ORDER

Only a technical objection has been taken to the correctness of the convictions in this case under the Gaming Act, but I am afraid the objection has to be allowed. The warrant issued under Section 5 does not set out that the Deputy Superintendent of Police who issued it, had reason to believe that the house in question was being used as a "common gaming house". All that it states is that information had been laid before him that gambling was going on in house No 67, Iyengar Street. It is only if there is a proper compliance with the terms of Section 5 that the presumption under Section 6 will apply. As a matter of fact, there is no proof in this case, apart from the presumption that can be raised under Section 6, that the house was used for the profit or gain of the person owning or occupying it. In the circumstances, the presumption does not arise and in the absence of specific evidence, the convictions have to be set aside.

It is desirable that officers who issue warrants under Section 5 of the Gaming Act take good care to employ the language of the section in the warrants, provided, of course, they are satisfied on information received by them that any place falls within the definition of "a common gaming house" within the Act.

The convictions and the sentences are set aside. The fines, if paid, will be refunded. The cash (M. O. 3) seized from the 1st accused will be given back to him.

N.T.R. — *Accused acquitted.*

*1945 M.W.N. 771 (1)

Criminal Revision Case No. 441 of 1945
(Criminal Revision Petition No. 404 of 1945)
October 26, 1945
KUPPUSWAMI AYYAR, J.
C. Ramachandra Rao, In re *

Public Health Act (Madras Act III of 1939), S. 142—Municipal health officer beating and abusing municipal maistri—Prosecution—Sanction—Cr. P. C., S 197.

Where the accused who is the health officer of a municipality abused and beat the complainant a maistri who was a subordinate of the municipality in the municipal buildings for not preventing the scavengers from creating disturbance.

Held, *that the act must be considered to have been done in the discharge of accused's duties and consequently sanction was necessary under Section 142 of the Public Health Act, before the accused could be prosecuted.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order dated 11-5-1945 of the Court of the Stationary Sub Magistrate of Chicacole and passed on the petition filed by the petitioner herein (accused) on 13-4-1945 in C. C. No 394 of 1945 on the file of the said Court of the Stationary Sub-Magistrate, Chicacole.

Kasturi Seshagiri Rao, for Petr.

Assistant Public Prosecutor (A. S. Sivakaminathan), for Crown.

ORDER

The only question for determination is whether sanction is necessary before the accused could be prosecuted. The prosecution was at the instance of a maistri of scavengers employed in the Municipality of Chicacole, and the petitioner, the accused, was a Health Officer of that Municipality. The scavengers alleging that they had some grievances when the salary was being distributed one evening, instead of receiving the salary they made a hubbub and created some disturbance. The

* 1945 M.W.N. 771 (2)

Health Officer was put out and when he noticed the maistry whose duty he thought it was to prevent these people from creating trouble, abused him and took him to task for not having prevented the people from creating disturbance, and is also said to have beaten him. That is the gist of the complaint. For accused it was stated that a prosecution like this cannot be launched without sanction. It was pleaded in the lower Court that sanction was required under Section 197 Criminal Procedure Code; it was contended by the prosecution that as he was not an officer who could be removed only by the Local Government no sanction was necessary. But then, apart from Section 197, Crl. P. C. under Section 142 of the Public Health Act, since the act of beating and abusing was said to have been done by the accused in the Municipal buildings to a servant who was a subordinate of the Municipality, the act must be considered to have been done in the discharge of his duties and consequently Section 142 of the Public Health Act would apply and sanction would be necessary. I therefore find that the prosecution cannot lie without sanction under Section 142 of the Public Health Act.

The revision petition is accordingly allowed, and the proceedings will be quashed as admittedly no sanction has been obtained.

N.T.R.

Criminal Revision Case No. 459 of 1945
(Criminal Revision Petition No. 422 of 1945)
October 26, 1945
KUPPUSWAMI AYYAR, J.

S. R. Viraraghava Ayyangar In re*

Madras Essential Articles Restricted Acquisition Order (1943) — *Section* 3 (1) — *Acquired — Meaning of — Purchase prior to order — Transport subsequent to Order — No offence.*

The word 'acquired' in section 3 (1) *Madras Essential Articles Restricted Acquisition Order means getting possession of the goods or proprietory rights over the goods. A person who had acquired paddy prior to the date on which the Order came into force and transports it does not commit an offence under the Order.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the judgment of the court of the 1st class Sub Divisional Magistrate of Kumbakonam dated 31-1-1945 and passed in Criminal Appeal No. 4 of 1945 (C. C. No. 1243 of 1944 Stationary Sub Magistrate Court Kumbakonam.)

M.S. Venkatarama Ayyar, for Petr.

Assistant Public Prosecutor (A.S. Sivakaminathan) for Crown.

*1945 M.W.N. 770

ORDER.

The petitioner was prosecuted for having committed an offence under section 3 (1) of the Madras Essential Articles Restricted Acquisition Order, 1943. This Order came into force in the Kumbakonam Muncipality on 14-10-1944. When the Rationing Officer tried to get a statement from the accused as to how much paddy he had in his house for his use, he learnt that certain paddy had been brought from Perambur in Tanjore taluq. The paddy was brought from Perambur to Kumbakonam on 24-2-1944 after the date on which this order came into force in Kumbakonam. The petitioner admitted these facts and he was accordingly convicted. What is urged is that it is only an *acquisition* subsequent to the date on which the order came into force that would amount to an offence and that no such acquisition had been made by the petitioner.

On the facts there is no dispute. There is evidence to show that the petitioner purchased the paddy at Perambur early in March and kept it in his son-in-law's house and there was delay in transporting it to Kumbakonam as he could not find facilities for such transportation. Under section 3(1), "no person shall except under the authority of a licence granted by an officer authorized by the Provincial Government in this behalf, *acquire* any essential article if by so doing the quantity thereof in his possession or under his control will exceed the normal quantity required by him." There is absolutely no evidence to show that this additional paddy was acquired by him after the date on which the Order came into force in Kumbakonam. If by acquisition is meant getting possession of the goods or proprietory right over goods, then it was done earlier than the date on which the Order came into force as the aquisition was early in March itself. What is urged by the prosecution is that the word "acquired" should be taken to mean, 'removing' the property to Kumbakonam. I do not think the word "acquired" can be taken to mean "transported." The word "acquired" is not defined in the Order, according to the *concise Oxford Dictionary*, it means, "gain by oneself and for oneself; come into possession of". The petitioner came into possession of the property early in March itself when he purchased the paddy. Therefore there was no acquisition subsequent to the date on which the order came into force in Kumbakonam. There are other provisions of law under which such transport is prevented but he is not prosecuted for any such offence. He has been prosecuted only for an improper acquisition

of the property subsequent to a particular date. The acquisition was prior to that date. Therefore the conviction has to be set aside.

The conviction and sentence are set aside—the petitioner is acquitted. The fine, if already paid will be refunded.

N.T.R.

PRIVY COUNCIL

(On appeal from Lahore)

July 3, 1945

LORDS THANKERTON, PORTER, GODDARD, SIR MAAHAVAN NAIR & SIR JOHN BEAUMONT.

Malak Khan v. The King Emperor*

Cr. P. C. (V of 1898) S. 417—Charge of murder and robbery—Acquitted of robbery—Appeal regarding murder charge—Evidence relating to robbery — Use of — Cr. P. C., Ss. 102 & 165—Search—Proof of.

In an appeal from conviction of murder the High Court is entitled to accept as corroboration of the guilt of the accused, evidence (given in the Sessions Court where the charge was one of murder and robbery) which was material to both charges but failed to convince the Session Court of the guilt of the accused of the crime of robbery with the result that he was acquitted of that charge.

The presenceof witnesses at a search is always desirable and their absence will weaken and may some times destroy the acceptance of the evidence as to the finding of the articles, but their attendance at the search is not always essential in order to enable evidence as to the search to be given. Where it is alleged and proved that the articles were produced by the accused man himself, S. 165 Criminal Procedure Code does not apply. That section is meant to be used in cases where a search warrant would be made use of in the ordinary course, but lack of time renders it impolitic to use it.

It is no doubt very important that as a general rule, all crown witnesses should be called to testify at the hearing of a prosecution, but important as it is there is no obligation compelling council for the prosecution to call all witnesses who speak to facts which the crown desires to prove. It is a matter for discretion of counsel for the prosecution and though a Court ought, and no doubt will, take into consideration the absence of witnesses whose testimony would be expected it must judge the evidence as a whole and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses.

A. G. P. Pullan, for Appellant.

J. M. Pringle, for Respondent.

JUDGMENT

LORD PORTER. This is an appeal from the judgment of the High Court of Judicature at Lahore dated the 18th October, 1944, dimissing the appellant's appeal from the judgment of the Sessions Judge of Jhelum dated the 1st July, 1944, and confirming the sentence of death passed upon him.

Special leave to appeal to His Majesty in Council was granted by an Order in Council dated the 21st March, 1945.

The main legal point for decision in this appeal is whether in an appeal from a conviction of murder, the High Court is entitled to accept, as corroboration of the guilt of the accused, evidence (given in the Sessions Court where the charge was one of murder and robbery) which was material to both charges but failed to convince the Sessions Court of the guilt of the accused of the crime of robbery with the result that he was acquitted of that charge.

Akbar Khan was a lambardar of the village of Babi, and he and his bro her-in-law. Nur Khan were waylaid on the 6th January, 1944, on their way back from the village of Munara three or four miles distant, where Akbar Khan had been collecting the revenue. The time at which the assault took place is disputed, but the finding of the Courts in India is that it was between 4 and 5 p.m. Both men received severe injuries apparently with blunt weapons, and Akbar Khan died the same evening. Nur Khan survived and was a witness in the case.

The first information report was registered at the Police station of Buchal Kalan at 10 a.m. on the 7th January, 1944 but is said to have been taken down at an outlying post at 4 a.m. by an Assistant Sub-Inspector of Police. The maker of the report Imam Din said that he had heard of the affair from one Muhammad Nawaz and that he had gone to the spot and heard a statement made by Akbar Khan, who subsequently died on the road. The persons named as the assailants were Umar Hayat, Malak Khan, appellant. Nur Alam Gulsher; Aurangzeb and Sarsa all residents of the village of Bhal.

In the course of investigation Nur Khan and two witnesses, said to be eye witnesses, told the police that Umar Hayat and the appellant had taken from Akbar Khan a black purse containing money and a list and a gold ring,

As a result of this information it is said that on the 8th January, 1944, Inspector Lutal

* 1945 M.W.N. 778

Khan and two other police officers who were taking part in the investigation went together with one Fateh Khan and one Allah Yar Khan to the appellant's house and there recovered the purse, money, list and gold ring which it was alleged the appellant had told the Inspector he had buried in his garden. The articles are said to have been buried under a stone and thence dug up and produced by the appellant. The Inspector thereupon, as he says, drew up a search list dated the 8th January, and it was signed by the three police officers and the two others who were present.

On the 29th February, 1944, separate charges were framed by the Magistrate, namely (1) against all six accused.

"that they committed murder by intentionally causing the death of Akbar Khan in prosecution of the common object of the unlawful assembly and caused grievous hurt to Nur Khan"

under sections 302, 325, 149 of the Indian Penal Code, and (2) against Umar Hayat and Malak Khan only that they committed robbery by forcibly removing the articles described above from the person of Akbar under section 391 of the Indian Penal Code. The trial under those charges was conducted before the Sessions Judge of Jhelum from the 27th to the 30th June, 1944.

The prosecution examined Nur Khan, Mohammad Nawaz and Alam Khan who professed to be eye witness of both offences, Imam Din who made the report, Mussamat Begam mother of the deceased and Mohammad Ismail whom he visited shortly before his death. The three police officers gave evidence for the prosecution but the Inspector alone spoke to the finding of the articles alleged to have been stolen. The Crown called neither of the attesting witnesses of the search list

Allah Yar Khan was, however, summoned as a defence witness to prove an alibi for Umar Hayat and Aurangazeb and in the course of his evidence alleged that Imam Din had told him that the appellant had been one of the assailants. As to the search he said in examination in chief.

"The A.S.I., S.I., Inspector, Fateh Khan and myself went to the house of Malak Khan but Malak Khan was not with us. The Inspector himself removed the stone and took out the purse etc. The stones were lying near the entrance to the courtyard by the side of the wall which is not very high. I do not remember if there is any berry tree there A man standing outside the compound wall could have placed the purse etc from where the articles were recovered The residential kotha (house) of Malak Khan is about 25 or 30 yards from those stones."

In cross examination he said :

"The fard (list) Ex. P. C. about the recoveries made from Malak Khan's courtyard is signed by me. I signed the fard without reading or understanding it. The fard was not read out to me. I was merely told that I was to sign the memo of recovery re. purse etc. The A.S.I. held the papers in his own hand when I signed the fard. It was neither dark nor light at the time of the recovery. The fard was not made out at the spot but at the dera (office)."

Other witnesses belonging to the village of Munara gave evidence to the effect that the attack was made after sunset, that Akbar had set out after taking an evening meal with Falak Sher D. W. 5, and that the first statement of Nur Khan had been that he did not recognise the assailants, whose faces were bandaged.

Two of the Assessors were for convicting all six accused, and one for convicting all but Hayat and Aurangzeb, who pleaded alibi.

The Sessions Judge in his judgment dated the 1st July, 1944, said it was clear that enmity did exist between the parties He dealt with the alleged recovery of the stolen property by saying :

"Nothing at all about these articles was mentioned in the first information report which was lodged on the same day by Imam Din P.W. 6 a brother-in-law of the deceased. The story about the robbery of this ring, etc., was mentioned for the first time on the next day, i.e. the 7th January, 1944, in the inquest report Ex. P-9, prepared by Assistant Sub-Inspector Man Mohan Lal P.W 13. It is significant that the inquest report is silent as to who actually disclosed these facts about the removal of the ring etc., before the Assistant Sub-Inspector.

"The case for the prosecution is that subsequently these articles were recovered from the courtyard of Malak Khan accused on the 8th January 1944, when Malak Khan himself produced them before Inspector Lutaf Khan P.W. 15, from under a stone in his court-yard.

"It is difficult to understand why the accused should have committed this robbery and particularly of such things as the receipts of Ex. P-3 and Fard Ex. P 4 which could be of no use to them at all, unless they merely wanted to place some evidence against themselves at the disposal of the police. I will ignore this part of the story and concentrate on the main case about the assault committed by the accused on Akbar Khan deceased and Nur Khan P.W. 3."

The learned Judge nevertheless accepted the evidence of the eye witnesses to the attack and convicted all the accused of murder under section 302/149 of the Indian Penal Code and of causing grievous hurt under section 325/149 of the Indian Penal Code but said :

"The case under section 392, Indian Penal Code (robbery) does not appear to me to be established and I acquit all the accused of that charge"

Their Lordships would observe that the learned Judge had failed to notice that only Umar Hayat and the appellant were accused of robbery, but so far as this appeal is concerned the fact appears to be immaterial.

Three appeals were presented to the High Court at Lahore one by Umar Hayat, Malak Khan, Nur Alam and Aurangzeb, second by Gulsher and a third by Sarsa, and all the death sentences were referred for confirmation.

The judgment of the High Court was delivered on the 18th October, 1944 by Teja Singh, J. with whom Bhandari, J. agreed. They apparently regarded the appellant as the principal culprit and decided that there was at least one incident proving the existence of serious ill will between Malak Khan on one hand and Akbar Khan, Nur Khan and Alam Khan on the other and providing a motive for Akbar Khan's murder.

As to the time at which it was alleged that the first information report had been made, they disbelieved both Imam Din who made it and the Assistant Sub-Inspector who wrote it, regarded it as having been made at a much later time than that given in evidence and drew the conclusion that the deceased was unconscious when Imam Din arrived and that the statements which were said to have been made to Imam Din by him were inventions pure and simple.

The learned Judge placed little reliance on the evidence of Mohammad Nawaz and Alam Khan and even of the injured Nur Khan, of whom he says:

> "The result in my opinion is that it is highly unsafe to act upon his statement unless it is corroborated by any other evidence of unmistakable character or by circumstances the correctness of which cannot be denied"

In his view, apart from the general tendency in cases of this nature to rope in innocent persons, Nur Khan and Imam Din were not the kind of persons who would scruple in confining themselves only to the men who were really guilty. He then proceeds:

> "The only corroborative evidence that we have in this case is with respect to Malak Khan. Nur Khan stated that after the deceased and he had injured Umar Hayat removed a purse, a ring and some papers from the deceased's pocket and made them over to Malak Khan: Malik Lutaf Khan, Inspector of Police, deposed that he reached the spot on the 8th and Malak Khan informed him that he had concealed the purse, etc., in his court-yard, After that he took the Inspector and his companions to the court-yard of his house and from underneath a few stones he produced the purse Ex. P-1, ring Ex. P-2 and fard Ex. P-4. We are also told that the purse contained a few papers including a receipt which evidently belonged to the deceased. The mother of the deceased identified the purse and the ring. The learned Sessions Judge has disbelieved the factum of theft and has taken the view that this part of the prosecution story was not true. This finding of his is not correct. There is no reason to disbelieve the evidence of the Inspector so far as the recovery of the articles is concerned. One of the appellant's own witnesses who had attested the memo evidencing the recovery admitted that the purse, etc., were recovered by the Inspector from a heap of stones lying in the courtyard of Malak Khan'shouse."

He goes on to say that it was contended that it was a fake recovery but gives reasons for rejecting that view and concludes:

> "The result, in my opinion, is that Malik Khan should be taken to have participated in the crime and the case regarding the others is doubtful."

The High Court accordingly allowed the appeals of the five other accused persons, but confirmed the sentence of death passed on the appellant under Section 302 of the Indian Penal Code. They do not mention Section 325 of the Indian Penal Code and leave the question of rioting open.

From this conviction and sentence the appellant obtained special leave to appeal to His Majesty in Council, the substantial ground being that

> "In view of the acquittal under section 392 of the Indian Penal Code it was not open to the Court to review the finding of the Court of Sessions Judge as to the recovery of these articles supported as it was by the evidence of the only search witness examined and by the probabilities of the case."

Indeed this argument was put in the forefront of the appellant's case. The Sessions Judge, it was said had acquitted the appellant of robbery, he was therefore not guilty of that offence; no appeal had been taken against that acquittal and therefore no court was entitled to take into consideration the allegation upon which the accusation of robbery was founded even as corroborative evidence in another case.

Their Lordships cannot accept this contention. The learned Sessions Judge did not in fact find the accusation baseless; he only found the crime not proven. But even if he had disbelieved the whole story of the recovery of the stolen property from the appellant, his finding would not prevent the High Court from weighing its value and if they accepted its substantial truth from taking it into consideration in determining whether another crime had been committed or not. The acquittal no doubt would have entitled the accused man to plead *autrefois acquit* if again charged with the same crime, but would it not prevent a civil action being brought against him for the return of the things stolen or for their value upon the same evidence.

It could not, in their Lordships' opinion, be objected to as evidence in another case, criminal or civil, though no doubt its weight would be diminished before the Sessions Judge it was given for two purposes (1) as corroboration of the testimony given in the charge of murder and (2) as direct evidence of robbery.

Before the High Court its use for the first purpose was in no way precluded even though no appeal was taken against the dismissal of the charge of robbery.

In such circumstances to appeal from the acquittal would be a mere idle form when the question at issue was whether the accused man was guilty of murder or not.

In their Lordships' view the conviction recorded by the High Court cannot be challenged on th s ground.

Two further argments were, however, put before their Lordships in support of the appellant's case.

In the first-place it was said that the two witnesses who saw the articles recovered should have been called by the Crown The argument was put in two ways. It was said that the requirements of section 165 of the Indian Code of Criminal Procedure were not followed. That section enacts :—

"(1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purpose of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may after recording in writing the grounds of his belief and specifying in such writing so far as possible the thing for which search is to be made search or cause search to be made for such thing in any place within the limits of such station."

'(4) The provisions of this Code as to search warrants and the general provisions as to searches contained in section 102 and section 103 shall so far as may be, apply to a search made under this section."

Section 102 need not be quoted but section 103 provides :

"(1) Before making a search...........the officer or other person about to make it, shall call upon two or more respectable inhabitants of the locality in which the p ace to be searched is situate to attest and witness the search."

"2) The search shall be made in their presenee and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it."

In their Lordships opinion the presence of witnesses at a search is always desirable and their absence will weaken and may sometimes destroy the acceptance of the evidence as to the finding of the articles, but their attendance at the search is not always essential in order to enable evidence as to the search to be given.

Where, as here, it is alleged and proved that the articles were produced by the accused man himself section 165 does not apply. That section is meant to be used in cases where a search warrant would be made use of in the ordinary course, but lack of time renders it impolitic to use it.

If the section did apply, proof of the search might be inadmissible for other reasons. but there would be no necessity to call either of the witnesses to the search having regard to the express terms of Section 103 2).

But a further objection has been taken; it is said that the two witnesses to the search were Crown witnesses and should have been called by the prosecution and that, as the provisions of Section103 (2) do not apply, the rule that the Crown should call or at least tender all its witnesses should be followed.

Their Lordships do not stay to consider whether in truth the two witnesses to the search are properly described as witnesses for the Crown since the argument breaks down on a wider ground. It is no doubt very important that, as a general rule all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desires to prove.

Ultimately it is a matter for the discretion of counsel for the prosecution and though a Court ought, and no doubt will take into consideration the absence of witnesses whose testimony would be expected it must judge the evidences as a whole and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses.

These views have often been expresed by their Lordships and are to be found in their latest form in a judgment of the Board pronounced in May, 1944, in the case of *Adel Muhammed Et. Dabbah* v. *Attorney-General of Palestine* [1].

The arguments so far considered have been objections aimed at establishing that there was error in law in the conduct of the case.

For the reasons they have given their Lordships think that this contention has not been made good. Apart from this objection the only remaining ground of attack on the conviction and sentences is not that wrong evidence was admitted or that there was no evidence on which a conviction would be based. but that the evidence had been wrongly evaluated and was not of sufficient weight to justify the conclusion reached.

It has many times been pointed out that for their Lordships to interfere it requires more than an allegation or even proof that a Court might take a different view of the compelling force of the evidence given. The grounds on

1. (1945) A.I.R. P.C. 42

which their Lordships' Board are justified in interfering with the decisions of Courts in India in criminal matters have been the subject of numerous statements, the last of which was made at a Board held on the 16th July, 1941 *Muhammad Nawaz v. Emperor* (2) when Viscount Simon (L C.) pronouncing the view of their Lordships quoted the well-known passages from Lord Watson's words in delivering the opinion of their Lordships *in Re Dillet* (3).

It has not been established before their Lordships that there has been a disregard of the forms of legal process in the present case or that grave or substantial injustice has been done and for these reasons their Lordships will, as they have already indicated humbly advise His Majesty that this appeal should be dismissed.

— *Appeal dismissed.*

Criminal Revision Case No 422 of 1945
Case Referred No. 29 of 1945
August 2, 1945
KUPPUSWAMI AYYAR, J.

Kumaraiah and others v. **Chinna Naiker**

Criminal Procedure Code (V of 1898) Sec. 203—Dismisal of complaint under—If bar to subsequent complaint.

The fact that a previous complaint was thrown out under Section 203 of the Code of Criminal Procedure is no bar to the entertaining of the second complaint but the question for consideration is whether, on the facts of the case, it will not be an abuse of process to take up the complaint on file and proceed with it.

Where there is nothing to indicate that there was no proper investigation on the previous complaint or that there was no necessity for investigation in the second complaint and no additional evidence was discovered or forthcoming.

Held, *that under these circumstances to entertain a second complaint would be an abuse of the process of Court.*

Case referred for the orders of the High Court, under Section 438 of the Criminal Procedure Code, by the Additional District Magistrate of Ramnad at Madura in his letter dated 8-5-1945

Public Prosecutor (V. L. Ethiraj), for Crown.

Accused and complainant not represented.

ORDER

This is a reference by the Additional District Magistrate of Ramnad with regard to C.C. No. 64 of 1945 on the file of the Additional Sub-Magistrate of Aruppukottai. Notice has been given to the complainant and he has not appeared in this Court. He filed a complaint for dacoity, theft, etc. against the accused. That was investigated by the police and was finally thrown out under section 203 of the Code of Criminal Procedure. This was on the 23rd December 1944. On the 18th January 1945 the complainant presented another complaint against the same accused on the same facts. The accused objected to the preferring of the complaint. The Magistrate held that the dismissal of the prior complaint under section 203 was not a bar to the entertainment of the second complaint. The Additional District Magistrate is of the opinion that the order of the Sub-Magistrate was unsustainable as he had no jurisdiction to entertain the second complaint as the prior complaint has been dismissed and refers the case under section 438 of the Code of Criminal Procedure to quash the order of the Sub-Magistrate taking the complaint on file. The fact that a previous complaint was thrown out under section 203 of the Code of Criminal Procedure is no bar to the entertainment of the second complaint. But the question for consideration is whether on the facts stated it will not be an abuse of process to take up the second complaint on the file and proceed with it. In the circumstanes, of this case, the original complaint was for theft dacoity etc and in the second complaint the charge of dacoity and theft were not pressed. There is nothing to indicate that there was no proper investigation on the previous complaint or that there was any necessity for investigating the second complaint. Even with regard to the offences in respect of which the second complaint was pressed the Magistrate who dismissed the earlier complaint has pointed out that there was no disinterested witness to prove the complainant's allegation. The Magistrate was of the opinion that the evidence likely to be available could not possibly lead to a conviction. Nothing was alleged by the complainant in the second complaint which would justify the Magistrate modifying that view. No additional witness had been cited in the second complaint nor, as pointed out by the Additional Magistrate was it alleged that any other evidence had been discovered or was likely to be forthcoming. In these circumstances to entertain the second complaint would be an abuse of the process of the Court and the order entertaining the complaint is quashed.

N.T.R. —

2. (194) M W N. 78 : Cr. 1 : 689 A-126
3. (1887) 12 A C. 459

END OF VOLUME

General Index—1945

First number denotes pages of The Madras Weekly Notes Full Series.

ABKARI ACT (Mad. Act 1 of 1886), S. 34—'Open place other than a dwelling house'—Meaning of 186; 38 (2)

BAR COUNCILS ACT (XXXVIII of 1926) S. 14 (1)—Right of advocate of one High Court to practise in courts subordinate to another High Court F B. 101; 17

CHILDREN ACT (Madras Act IV of 1920) S. 5 (2)—Cr. P. C. S. 349 (1)—Several accused—One, a child or youthful person—Procedure for reference 182; 34

CHRISTIAN MARRIAGE ACT, S. 88—Scope of 421:73

COFFEE STEALING PREVENTION ACT (Mad. Act VIII of 1878), S. 10—Permission not in proper form—Liability 248:46

CONTEMPT OF COURT—Principles governing—Costs in such cases against Crown P. C. 371; 67

CONTEMPT OF COURTS ACT (XII of 1926), S. 2 (3)—Mussalman Wakf Act, as amended by Bom, Act XVIII of 1935, S 3—Order by Court of Small Causes to furnish information—Failure to obey—Committal for contempt—Penal Code Ss. 40, 43 & 176—General Clauses Act, S. 26. P.C 564; 112

CRIMINAL PROCEDURE CODE (V of 1898) S 35—Conviction under section 457 and 380 Penal Code—Separate sentences. 106 (1): 22 (1)

——S. 102—General investigation into a case of murder—Search—Formalities if necessary. 556; 104

——Ss. 102 & 165—Search—Proof of P C. 778:140

——S. 145—Tenant in possession—When possession of landlord. 104; 20

——S. 145 (4) Proviso—Construction of. 109; 25

——Ss. 154 & 156—Statutory right of Police to investigate cognizable offence. P.C. 49; 9

——Ss 190 436 & 437—Sessions Judge, if can direct Magistrate to take cognizance of an offence 427; 79

——S. 195 (1) (b)—Forging of sale deed for blackmail—Complaint against writer and attestors 266; 54

——Ss. 195 (1) (b) & 476—False complaint to police—Charge sheet—Discharge of accused—Prosecution of complainant under S. 211 I.P.C. —Complaint 425; 77

——S. 196A—Prosecution under S. 120B, I.P.C. read with R. 90B Defence of India Rules—Sanction 557; 105

——S. 197—Authority higher than a Provincial Government—Who is F. C. 113; 29

——S. 197—Sanction under—Proof of 361 (2); 57

——S. 203—Dismissal of complaint under—If bar to subsequent complaint 783 (1); 144

——S. 253 (1)—Discharge of one accused under—Prosecution of another accused proceeded with—Final order—Date of discharge—Limitation Act, Art, 23 280; 56

——S. 342—Questioning accused under—Object of—Proper form 780 (1); 134

——S. 345—Complaint—Sworn statement showing compoundable offences—Compounding—Legality 697; 128

——S. 349 (1)—Several accused—One child or youthful person—Procedure for reference 182; 34

——Ss. 380 & 562—Enquiry under S. 380—Nature of 105; 21

——S. 383—Imprisonment till the rising of court Valid 181; 33

——S. 403—Charge under Ss. 467 & 420, I.P.C.—Acquitted under S. 420 and convicted under S. 467—Effect of on appeal 185 (2); 38

——S. 403—*Autrefois acquit*—Trial under Ordinance II of 1942—Discharge or acquittal—Retrial under section 4 of Ordinance XIX of 1943 185 (1); 37

——S 403 (1)—Conviction under Ss. 147 and 148, I.P.C.—Acquittal on appeal and remand for trial under Ss. 323 and 324—*Autrefois acquit* 428 (1); 80 (1)

——S. 417—Charge of murder and robbery—Acquittal of robberry—Appeal regarding murder charge—Evidence relating to robbery—Use of P. C 778: 140

——S. 417—Powers of High Court under P. C. 560 (1); 108

——S. 437—Enquiry into an offence under s. 307, I.P.C.—Charge by magistrate for offence under Ss.147, 323 and 326—Additional District Magistrate, if can direct committal to sessions, 433;85

——Chapter XXXIX & Ss. 426 & 561-A—Bail—Convicted person—Special leave to appeal to Privy Council obtained—High Court—Power to grant bail P C. 366; 62

——S. 476—Provisions of—Exhaustive—Police standing Order No. 157—Sub divisional magistrate conducting enquiry under—A court—If can file complaint as 'court' 431; 83

——S. 489—Order for maintenance—Subsequent living together—Effect 691; 127

——S. 491—Habeas Corpus—Limitation to issue common law writ—Appeal P. C. 546; 94

——Ss. 497 (5) 498 & 561A—Powers of High Court to cancel bail and order re-arrest 435; 87

——S. 549 & rules under—Person subject to military naval or air force law—Trial of—Procedure 262; 50

——S. 561-A—confers no power but safeguards all existing power P. C. 366.62

——S. 561-A—Inherent powers, Extent of P. C. 49; 9

——Ss. 562 & 380—Enquiry under S. 380—Nature of 105; 21

CRIMINAL RULES OF PRACTICE R. 102—Imprisonment till rising of court—Valid 181; 33

CRIMINAL LAW—Principle on which the Privy Council will interfere in criminal cass—Breach of natural justice P. C. 47 ; 7

——Statutory duties imposed on police and judiciary—Power of judiciary to interfere with police investigation—Cr. P. C. Ss. 561-A, 154 & 156 P. C. 49; 9

——Sentence—Transportation for life—Convict not transported—Period served with remission earned amount to 14 years—If entitled to release P. C. 188; 40

CRIMINAL TRIAL—Murder—Confession to witness—Uncorroborated—Conviction on. P.C. 560(2):108

——Joint trial of husband and wife—Statement by wife—Admissibility P. C. 610: 121

——Statement of accused—Entitled to consideration 249; 47

DEFENCE OF INDIA ACT S. 2 sub-sec. 5—Only supplementary—Ordinary method in Chapter II of part III of the Constitution Act not excluded P. C. 546; 94

DEFENCE OF INDIA RULES, R. 26—Not *ultra vires* P. C. 546; 94

—R. 75-A—If *ultra vires*—Government of India Act, Ss. 102 (1) & 299, Sch. VII, List II, Items 9, 27 & 29 55; 15
—R. 81 (2) (a) & (b)—Notification under cl. (b) prohibiting withholding from sale—Validity—Withholding from sale—What is 54; 14
—R. 119—Publication of order—Mode of proof 184; 36
—R. 128—Scope of 557; 105
DRUGS CONTROL ORDER, 1943, Cl. 16—Prosecution prior to sanction—Effect—Form of sanction F C. 428(2) 80(2)
ESSENTIAL ARTICLES RESTRICTED ACQUISITION ORDER (1943)—S. 3 (1)—Acquired—Meaning of—Purchase prior to Order—Transport subsequent to Order—No offence. 770; 139
EVIDENCE ACT (1 of 1872), S. 27—Statement under Proof 102:18
—S. 30—Confession must be of offence charged 722(2):132
—S. 114 Illustration (a)—Not exhaustive 107; 23
—S. 114 III (a)—Accused deaf and dumb—Presumption under—Criminal Procedure Code Section 341 692 (1), 131
—S. 145—Letter and telegram by witness—Admissibility P. C. 634; 129
—S. 157—"At or about the time"—Meaning of 114; 30
EXPLOSIVES ACT (IV of 1884), S. 5—Possession of yellow phosphorous—If offence—Explosive Substances Act—Defence of India Rules, R 54—Notification under—Scope of 689; 125
FOOD GRAINS CONTROL ORDER Cl. 3 (1)—Defence of India Rules, R 81 (4)—Purchase in wholesale quantities without licence—Offence 247; 45
—R. 3 (2)—Defence of India Rules R. 81 (4)—Storing in wholesale quantities—Order for confiscation—Extent of 438; 90
—Licence under Cl. 6—If applies to wholesale sales only—Defence of India Rules R. 81(4) 263; 51
GAMING ACT (Mad. Act III of 1930), Ss. 5 & 6—Presumption 56; 16
—Ss. 5 & 6—Warrant—Presumption :771 (1): 138 (1)
GENERAL CLAUSES ACT, S. 26—Applicability P.C. 564:112
GOVERNMENT OF INDIA ACT, S. 49 (1) & (2)—Scope of individual judgment of Governor—Home minister a subordinate of the Governor P.C. 546,94
—Ss. 102, 223, 311 (6) 316 & Sch IX, Para 72—Legislative delegation to executive when valid P. C. 41 (2); 1
—S. 205—Appeal in Habeas corpus cases P. C 546; 94
—S. 270 (1)—Proceedings civil and criminal—If includes Court Martial proceedings F. C. 110; 26
HABEAS CORPUS—Nature of in British Jurisprudence—Appeal against order directing discharge P. C. 546; 94
LEGAL PRACTITIONERS ACT (XVIII of 1879), Ss. 4 & 38 Bar Councils Act S. 14 (1)—Right of advocate of one High Court to practise in Courts subordinate to another High Court F. B. 101; 17
—S. 13—Getting signature of client on blank paper—Professional misconduct. F.B. 106 (2); 22(2)
LIMITATION ACT (IX of 1908), Art 23—Cr. P. C., S. 253 (1)—Discharge of one accused—Prosecution of another accused proceeded with—Date of discharge 280; 56
MOTOR VEHICLES ACT (IV of 1939), Ss. 2 (8), 42 (1) & 123—Goods vehicle—What is 430; 82
NEWSPRINT CONTROL ORDER (1941)—Cl. 3 (6)—'Newspaper,' if includes supplement—Defence of India Rules, Rule 81 (4). 434; 86
—Cl. 5 (1)—Offence under—Effect of repeal and supersession by Newspaper Control Order 1944—General Clauses Act, Section 6 571: 119
PENAL CODE (XLV of 1860) S 34—Proper and necessary ingredients for application—'Common intention' not to be confused with 'same' or 'similar' intention P.C. 379; 69
—Ss 34 & 302—Two persons beating deceased on head—Death—Offence—Sentence, 732; 185
—Ss. 40, 43 & 176—Offence punishable under S. 176—What is P. C 564; 110
—S. 53—Cr. P C. S. 383—Imprisonment till the rising of the Court If valid—Criminal Rules of Practice, Rule 102. 181; 33
—S. 296—offence under—Ingredients 569; 117
—Ss. 380 & 457—Separate sentences 106 (1); 22 (1)
—S. 411—Goods criminally misappropriated—Possession of—Presumption. 107; 23
—S. 494—Christian Marriage Act S. 88—Marriage between Roman Catholic and Protestant in Protestant Church—Validity—Subsequent marriage between Catholic husband with Catholic in Catholic Church—Bigamy—"Personal law" in S. 88—Scope of—Custom permitting divorce—Validity. 421;73
—S. 499 Exception 9—Club—Breach of rule by wife of member—Complaint by committee to husband in good faith—No offence 249; 47
PRESS EMERGENCY POWERS ACT (XXIII of 1931), S. 2 (6)—News sheet—What is. 205; 43
PREVENTION OF ADULTERATION ACT (Mad. Act III of 1918) S 6-A (2)—'Reason to believe' that the warranty was true. 559; 107
—Rules under—R. 28-B—Ingredient of sweetmeat—What is 636; 130
PRIVY COUNCIL—Interference in criminal cases. P. C. 47; 7
PUBLIC HEALTH ACT (Madras Act III of 1939) S. 142—Municipal Health officer beating and abusing municipal maistri — Prosecution—Sanction—Cr. P. C. S. 197 771 (2); 138 (2)
RESTRICTION & DETENTION ORDINANCE (III of 1944) Cl. 11, sub-cl. (2)—If ultra vires—Subsequent facts after order of detention—Constitution Act, Ss. 59 (2) & 93 F. C. 445; 91
SPECIAL CRIMINAL COURTS ORDINANCE (II of 1942) Ss 5, 10, 16 & 26—Validity — Government of India Act (1935) Ss. 102, 223, 311(6), 316 & Sch. IX, Para 72—Legislative delegation to executive—When valid P. C. 41 (2); 1

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